Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SONGBYRD, INC.,
Petitioner,

vs.

ESTATE OF ALBERT B. GROSSMAN, D/B/A BEARSVILLE RECORDS
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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31pp

QUESTIONS PRESENTED

Introductory statement:

The procedural history is a necessary guide to understanding the questions presented. The cause of action, particular to the Louisiana Civil Code, is revendication. The Respondent removed the action to federal court, which dismissed as time barred under Louisiana law. The Fifth Circuit reversed the lower court's decision, and remanded, concluding under Louisiana law that the action was timely. Without identifying a statutory basis, the lower court transferred the case *sua sponte* to the Northern District of New York where the case was dismissed as being time barred under New York law. Petitioner was therefore compelled to appeal to the Second Circuit on 1.) the transfer, and 2.) the questions of timeliness and governing law. The Second Circuit affirmed the district court's ruling that the case was time barred under New York law, and concluded that Petitioner could not assert personal jurisdiction on the revendicatory action under the Due Process Clause.

The following questions are presented:

1. After the Court of Appeals for one circuit determines on summary judgment that an action is not time barred, whether another Circuit Court thereafter, upon a second motion for summary judgment, may determine that the same cause of action is time barred?

2. Whether a district court's *sua sponte* transfer of a case, based solely on a finding of lack of personal

jurisdiction, and without citation of statutory authority, entitles either party to directly appeal as of right to the appellate court familiar with the substantive civil law cause of action under which personal jurisdiction is asserted?

3. Under Louisiana law, whether a non-resident precarious possessor of a corporeal moveable, who concedes that his ancestor in title is the petitioner herein, can reasonably anticipate being haled into a Louisiana State court, consistent with the Due Process Clause, to respond to the Louisiana resident owner's state law cause of action for revendication of ownership in and to the corporeal moveable?

4. Whether the Second Circuit committed manifest error in its application of New York law to the case at bar?

5. Whether the Second Circuit committed manifest Constitutional error by collapsing the issue of personal jurisdiction to a federal "minimum contacts" standard, without first considering the reach of the Louisiana Long-Arm Statute, the Louisiana property law cause of action, the New York resident's relationship to the master recordings, and the New York resident's purposeful disregard of the forum state's interest in protecting ownership of Louisiana resident's artistic creations?

6. Whether the Court should exercise its supervisory jurisdiction to instruct Article III judges that the duty to avoid reliance upon the Constitution is the accepted and usual course of judicial proceedings, and that widespread departure therefrom is impermissible.

PARTIES TO THE PROCEEDING

FOR SONGBYRD, INC.:

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Reverend Alexander E. Byrd
Barbara Walton
Patricia Walton (a/k/a Pat Byrd)
Randy Opotowsky, Esq.

There is no parent or publicly held company owning 10% or more of the corporate stock.

OTHER INTERESTED PARTIES

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Parker Dinkins, Esq.
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FOR THE ESTATE OF ALBERT B. GROSSMAN: D/B/A BEARSVILLE RECORDS, INC.

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PETITION FOR WRIT OF CERTIORARI

SongByrd, Inc., a closely-held Louisiana family corporation whose sole asset is the set of intellectual property rights of Henry Roeland Byrd, professionally known as "Professor Longhair" ("SongByrd") respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 10, 2000, in order to resolve the conflict herein with the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1997.

ORDERS AND OPINIONS BELOW

This action was commenced by Petition in Civil District Court for the Parish of Orleans (App. F), filed on August 14, 1995. After removal by respondent to the Eastern District of Louisiana, the Honorable G. Thomas Porteous, Jr. dismissed the case by order and reasons entered June 19, 1996, WL337259 (E.D. La (App. A). The United States Court of Appeals for the Fifth Circuit reversed and remanded, SongByrd, Inc. v. Bearsville Records, Inc., 104 F. 3d. 773 (5th Cir. 1997), decided February 4, 1997 (App. B). On remand, the District Court ordered a transfer and a remand of the case to the

Northern District of New York (App. E), entered May 9, 1997. After Answer filed by Respondents (App. G) in the Northern District of New York, Magistrate Judge David R. Homer presiding, dismissed the case by order and reasons entered September 21, 1998, SongByrd, Inc. v. Estate of Grossman, 23 F. Supp. 2d 219 (N.D.N.Y. 1998) (App. C). The United States Court of Appeals for the Second Circuit affirmed the dismissal by order entered March 10, 2000, SongByrd, Inc. v. Estate of Grossman, 206 F.3d. 172 (2nd Cir. 2000) (App. D).

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1), timely filed within 90 days of the final decision rendered in SongByrd, Inc. v. Estate of Grossman, 206 F. 3d. 172 (2nd Cir. 2000), on March 10, 2000, upon the petition of any party to any civil case.

STATUTES INVOLVED IN THIS CASE

La. C.C. Art. 526.
Recognition of ownership; recovery of the thing:

The owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him.

U.S. Const. Amend. XIV, § 1
Reads in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

For a full statutory appendix, please see Appendix H.

STATEMENT OF THE CASE

If possession is nine tenths of the common law of property, then the civil law of property provides the other tenth: revendication of ownership.

This case is about a property right, perhaps peculiar to the only civilian jurisdiction in the nation, but nonetheless and most surely a creature of the sovereign state of Louisiana.

The Court last visited the civil law action of revendication in Ellis v. Davis, 109 U.S. 485, 3 S.Ct. 327 (1883). Recognizing the distinction drawn by the Louisiana Supreme Court between opened and closed Successions: "If the succession...has proceeded so far that the parties entitled under the will have been put into possession of their rights to the estate, then the resort of adverse claimants must be to an action of revendication..." 109 U.S., at 499.

In support of its dismissal of the complainant's action, the Court stated:

> The present suit is not an action for nullity, because it prays for the recovery of possession of the inheritance, to which the appellants [complainants] claim the legal title as heirs at law of Sarah Ann Dorsey. **That claim...is properly the subject of an action of revendication[1], which**

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[1] In support of its dismissal, the Court exhaustively surveyed the early Louisiana cases on revendication: O'Donogan v. Knox, 11 La. 384 (1837) (testament in probate not subject of action of revendication); Robert v. Allier's Agent, 17 La. 4 (1841) (district courts are the proper tribunal when action in revendication is brought by an heir at law against an heir in possession); Rachal v. Rachal, 1 Rob. (La.) 115 (1841) (probate proceedings are not binding on action in revendication in courts of ordinary jurisdiction); Succession of Duplessis, 10 Rob. (La.) 193 (1845) (Probate proceedings are preliminary and not binding for purpose of action in revendication); Succession of Dupuy, 4 La. Ann. 570 (1849) (courts of ordinary jurisdiction are proper for revendication action to set aside defendant's claim over property) (see also Sophie v. Duplessis, 2 La. Ann. 724 (1847); Abston v. Abston, 15 La. Ann. 137 (1860); Sharp v. Knox, 2 La. 23 (1830) to same effect); Hoover's Succession v. York, 30 La. Ann.

> **furnishes a plain, adequate, and complete remedy at law...** Id. at 338 [emphasis supplied].

The Court's survey of La. Law recognized that revendication applied to moveables as well as to immoveables, but the petitory action came to replace the revendicatory action for immoveables and the revendicatory action was relegated to nothing more than commentary in the subject of scholarly treatises on the civil law. (App. B, p. 14-21).

Over the ensuing 100 odd years, Louisiana courts have struggled[2] with the revendicatory action, possibly because none of the cases recognizing it had articulated the textually demonstrable Civil Code basis for it: Article 526.

The re-awakening[3] of Codal Article 526 by the Fifth Circuit[4] provides the Estate of Professor Longhair with a

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752 (1878) (matter incidental to opening and settlement of a succession); Blasini v. Blasini's Succession, 30 La. Ann. 752 (1878) (suit of probate jurisdiction not closed by previous judgment of possession); Gibson v. Dooley, 32 La. Ann. 959 (1880) (No revendication action for want of prayer for ejectment or prayer to be put into possession of property claimed under the will).

[2] See, for example Witson v. Succession of Staring, 175 So. 495 (La. App. 1 Cir. 1937); Cooney v. Blythe Co., 200 so 517 (La. App. 1 Cir. 1941); Stephens v. Drake, 134 So.2d 674 (La. App. 2 Cir. 1961); Travelers Ins. Co. v. First Nat. Bank of Shreveport, 675 F.2d 633 (5th Cir (La.) 1982).

[3] "The law hath not been dead, though it hath slept." William Shakespeare, Measure for Measure, act 2, sc. 2, ln. 178. Desuetude is no more applicable to a civil code article than it would be to a clause in the Constitution of the United States.

property law cause of action capable of revendicating the master recordings from which resulted the 1987 Grammy award-winning album **"House Party New Orleans Style: The Lost Sessions 1971-72"**. Petitioner alleges the masters were brought to Bearsville Studio in Woodstock, New York, at the request of Respondents, and were inadvertently left there by JazzFest founder Quint Davis in 1972 (App. F, p.69). The Fifth Circuit has rendered a scholarly opinion herein (App. B, pp. 6-28), of special interest to civil and constitutional law jurisprudence, under which SongByrd's revendicatory action has not yet accrued, much less expired.

The transportation and shipping of chattels, of things, across state lines, has never been so commodious as it is

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[4] More accurately, the meaning of La. Civil Code Art. 526 was explained in dicta less than a week before the Fifth Circuit's decision in SongByrd I:

> The problem with the Parish's reliance upon Art. 526 is that the Article gives rights to the *present owner* of the thing to be recovered. That is, Article 526 *presupposes* that the plaintiff already is the owner of the thing to be recovered. *See generally 2 Yiannopoulos, Louisiana Civil Law Treatise: Property 350 (3d. Ed. 1991)"* Plaquemines Parish Commission Council v. Delta Development Co., Inc., 688 So. 2d. 169, at 175 (La. App. 4th Cir. 1997).

Apparently Judge Weiner's "Erie-guess" in SongByrd I was quite accurate, for this appellate court is the one in which appeal would lie had Respondent not removed the case *sub judice* to the Eastern District. Of more importance to the writ at hand is the jurisdictional notion of a *present owner*, which implies that the legal situs of the moveable for which revendication is sought has never left Louisiana, wherever the moveable may physically be found.

today[5]. Of what good is the right of revendication without a remedy that reaches across state borders and international datelines? Determining the reach of the Louisiana Long-Arm Statute is critical to the viability of this particular cause of action protecting ownership as a state-created property right in an increasingly global and digitally connected world.

In this case, SongByrd I mandated that the District Court on remand "address the issue of personal jurisdiction"[6] upon which it could have expressed no

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[5] And, concomitantly, we have suffered catastrophic cultural displacements of treasures and artworks engendered by the World Wars. See, generally, The Spoils of War (Elizabeth Simpson Ed., Harry N. Abrams, Inc., Pub. 1997).

[6] We do not know the basis for the Eastern District court's transfer, so we do not know the standard the court applied. The applicable standard, however, appears to be less rather than more:

> When a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing [as was the situation here]...the non-moving party need only make a prima facie showing, and the court must accept as true the non-mover's allegations and resolve all factual disputes in its favor [citations omitted]. Guidry v. U.S. Tobacco Co., Inc., 188 F. 3d. 619, 625 (5th Cir. 1999).

The lack of statutory basis is a compelling reason for the Court's guidance, in and of itself. Possible statutory basis exists in only 3 statutes: 28 U.S.C. §1404(a), §1406(a), and §1631. The Second Circuit in SongByrd II believes that §1631 treats of subject-matter, and not of *in personam* jurisdiction (see App. D, pp. 52-3, fn.9); the "interests of justice" under §1406(a) can hardly be served where non-mover's best litigation strategy is to take the unheard-of risk of voluntary dismissal and then appeal one's own dismissal; also there appears no certification under 28 U.S.C. §1292(b); finally, as to §1404(a), the court-initiated transfer, in opposition

opinion "at this juncture"[7] (App B, p. 28). The issue ought not to have been pretermitted by the Eastern District in the first place (App. B).[8]

Yet, the Eastern District judge transferred because he found "a lack of personal jurisdiction" (App. E, p. 65) on remand, presumably under the Louisiana Long-Arm

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to both parties, is one of the very questions left open by the Court in Ferens v. John Deere Co., 494 U.S. 516, 530 (1990). See also Van Dusen v. Barrack, 376 U.S. 612 (1964).

[7] It should be noted that Petitioner, while focusing on specific jurisdiction, has always asserted and has never waived general jurisdiction. The Fifth Circuit's "stream of commerce" analysis is very broad, and "should be examined under the stream of commerce standard as set forth in Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L. Ed. 2d. 290, 100 S. Ct. 559 (U.S. 1980) and explained in Bean Dredging Corp., 744 F. 2d at 1083 (1081)" U.S. v. Avondale Industries, Inc., 841 F. Supp. 180, 184 (5th Cir. 1993). Under Avondale and the facts of the case at bar, the Fifth Circuit would be likely to find that the mere sales of the record **"House Party New Orleans Style"** by Respondent's licensee in Louisiana is sufficiently foreseeable to satisfy the stream of commerce theory for assertion of general *in personam* jurisdiction.

[8] "The question of the applicability of [the forum state's] statute of limitations...presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." Metropolitan Life Insurance Co., v. Robertson-Ceco Corp, et. al. 84 F.3d 560, 574 (2nd Cir. 1996) (Citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778, 104 S. Ct. 1473, 1480 79 L.Ed.2d. 790 (1984)).

Statute[9], for he made no mention of the Due Process Clause.

Respondents received a bonus for the change in forum: a change in law. Petitioner was compelled to litigate under a limitations law far less subtle in the area of property law than is the civilian tradition.[10]

Then, the Second Circuit announced a new circuit procedural rule in this case, that Petitioner ought to move for retransfer before the Northern District, knowing full well that an adverse decision would be a foregone conclusion, for the sole reason of supporting the Second

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[9] Petitioner's argument for the exercise of personal jurisdiction under La. Code of Civil Procedure Article 13: 3201 (5) (App. H, p. 85) has not changed one whit:

> The design of the statute is to reap the 'fullest benefit' from United States Supreme Court cases relaxing constitutional due process requirements as such pertain to personal jurisdiction in civil suits...to tap the full potential of jurisdiction *in personam* over nonresidents...These two comments indicate the broad scope of subsection (5), showing that it embraces "real rights" as well as 'immovable property', and that it is intended to encompass all those rights traditionally classified as 'real rights'. Mayeux v. Hughes, 333 S. 2d. 273, 275 (La. App. 1st Cir. 1976).

Coupled with SongByrd I's Erie-analysis of revendication as a 'real right', the "present owner" dictum in Plaquemines Parish, supra, fn. 4., and the mere prima facie showing required Guidry supra, fn. 6 it is highly likely that the Louisiana Supreme Court would assert such jurisdiction *in personam* over Respondent in this case, under this cause of action.

[10] A common myth is that the Louisiana Civil Code only dates back to the Code Napoleon, but if truth be told, the property law Articles date back one and a half millennia, to the Code of Justinian c. 500 A.D.

Circuit's jurisdiction to review the transfer order of the transferor court. (App. D, p. 49)

The Second Circuit concedes that the choice of law was outcome-determinative (App. D, pp.53-55), and purports to address the question of paramount importance to the State of Louisiana's action in revendication (App. D, p. 56-58)

In light of the newly recognized substantive cause of action for revendication of moveable, how, if at all, is the Louisiana Long-Arm Statute broadened and extended? May it reach across state lines to assert a revendicatory claim against the precarious possessor of the resident's moveable property, where that precarious possessor sets up his title through acknowledging the owner's common ancestry? (See Answer, App. G pp. 78-81).

Yet the Second Circuit, in clear disregard of its own jurisprudence[11], fails to consider state law at all[12], and

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[11] There thus exists an overwhelming consensus that the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with "federal law" entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee. [Footnote omitted]... State statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whimsy; like most legislation they represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations. We see nothing in the concept of diversity jurisdiction that should lead us to

instead collapses the two-part inquiry into one (App. D, p. 57).

On the basis of specific *in personam* jurisdiction, the one and only State in the Union into which New York Respondent could reasonably anticipate being summoned for the purpose of defending his muniment of title to the master recordings at issue is the State of Louisiana.

Your petitioner SongByrd, The Professor Longhair Company, has been denied a meaningful review and an appeal as a matter of right[13] under the Louisiana law of revendication and the Louisiana Long-Arm Statute, by two district courts and two circuit courts of appeals.

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read into the governing statutes a congressional mandate, unexpressed by Congress itself, to disregard the balance thus struck by the states. [fn.6]

[fn.6] The diversity clause of Article III was not one of the provisions of the Constitution about which the founders felt very deeply. Madison thought it was not "a matter of much importance. Perhaps it might be left to the state courts" 2 Elliot, Debates on the Federal Constitution (1828), at 391. Marshall conceded in the Virginia convention, "Were I to contend, that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment."

Arrowsmith v. United Press Int'l, 320 F. 2d 219, 223, 226 (2nd Cir. 1963).

[12] Lack of "familiarity" with Louisiana law is no excuse, as is clearly shown by the Court's exhaustive survey of revendication cases in Louisiana prior to 1883, see Ellis v. Davis, supra, fn. 1.

[13] 28 U.S.C. 1294 (1).

REASONS FOR GRANTING THE WRIT

I.
The Second Circuit Committed Manifest Constitutional Error By Invoking The Constitution To Decide A State Law Matter

A. The improvident exercise of judicial review by the inferior courts ought be restrained by prudential concerns.

This case, about the other one tenth of the law of property, presents the Court with a jurisprudential opportunity *non-pareil*. The Court approaches constitutional interpretation just as the civilian jurist approaches a civil code. How else can historic reversals or departures from precedent be reconciled with *stare decisis*, other than to view the Constitution as the law of last resort? Each Article III judge, whether trial, appellate, or Justice, throughout the years, may draw anew[14] from the Constitution as their individual conscience and predilections dictate.

Indeed, the only difference between Constitutional jurisprudence and civilian jurisprudence is identifying the fount from which springs the power of judicial review; in

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[14] Compare Louisiana's jurisprudential approach, SongByrd I., at 777 (App. B, pp. 13), "...the doctrine of *stare decisis* does not apply. Instead, each judge, trial and appellate, may consult the civil code and draw anew from its principles." citing Alvin B. Rubin, Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad, 48 La. L.Rev. 1369, 1372 (1988).

the proper case, to break free from precedent by invocation of the law of last resort. Marbury v. Madison[15] sets the one and only precedent to which the federal courts are always bound, to support and defend the Constitution against all challenges whatsoever. In civil law, the source of such power is more opaque.

Being bound by either the tradition or by the precedent not only empowers the civilian judiciary and the Article III courts with the right of judicial review, it also obligates these jurists to refrain from using that power except as a last resort.

> "O, it is excellent
> To have a giant's strength, but it is tyrannous
> To use it like a giant"[16]

Every Article III judge is constitutionally empowered, as must be the case under Marbury v. Madison, to reach the constitutional issue in any given case. However, it is up to the Court, and to this Court only, to exercise its supervisory jurisdiction over the judiciary for departing from the duty to avoid the constitutional issue if lesser

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[15] "It is emphatically the province and duty of the judicial department to say what the law is.... This is of the very essence of judicial duty." Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[16] Shakespeare, Measure for Measure, Act 2, sc. 2. The remainder of Isabella's response to Lucio is noteworthy as well:

> "Could great men thunder
> As Jove himself does, Jove would ne'er be quiet.
> For every pelting petty officer
> Would use his heaven for thunder: nothing but
> thunder.——
> Merciful heaven!"

grounds are available for decision. Very few state law matters ought rise to the level of a Constitutional decision.

B. The conflict here between co-equal circuit courts on the same issue and in the same case is indicative of a systemic lack of prudential concerns.

This diversity case, for instance, arising as it does out of substantive state property law, hardly calls for the exercise of the power of judicial review. Either the Louisiana Long-Arm Statute extends *in personam* jurisdiction under Louisiana substantive law to the non-resident Respondent under the facts and circumstances of the case, or not.

Your Petitioner has been to two circuit courts[17], and neither has addressed the state law question. The Fifth Circuit could not because the question was not presented to it by the Eastern District judge, and the Second Circuit could not because it has so far departed from the accepted and usual duty to avoid constitutional questions that it does not even pause before collapsing the state law issue into a constitutional question subject to the power of judicial review.

The Second Circuit committed manifest Constitutional error by reaching out to invoke Due

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[17] Conflicting Court of Appeals decisions in the same case, on the same issue (whether Petitioner's cause of action is time-barred), and in the same procedural posture (summary judgment), is reason enough to grant the writ under Supreme Court Rule 10(a), in order to untangle (or to cut through) the Gordian knot of litigation for this and for future cases.

Process while ignoring the state law analysis. Unfortunately, it is not alone. This is a problem of systemic proportion[18], and thus compels guidance only the Court can provide.

C. The common practice of Article III courts routinely entertaining the Due Process Clause defense to personal jurisidiction in diversity matters is an improvident exercise of judicial review that ought be restrained by the Court's supervisory authority.

Resort to the Due Process Clause has become as common in the civil law context as in the criminal law context, and perhaps more so. Are there any civil diversity cases pending in any district or circuit court in which the lack of personal jurisdiction is NOT plead as an affirmative defense?

Whatever has become of the notion that our Several States are to be encouraged to experiment with their laws with a minimum of federal intrusion? Louisiana's property law Article is just such an experiment. Moveable things tend to grow legs, and pay little heed to territorial boundaries. Absent the reach of the Long-Arm statute to follow the property across state lines and summon the non-resident precarious possessor into court, Louisiana

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[18] Wright and Miller, Federal Practice and Procedure, Civil 2d. Section 1075, "When the federal court is sitting in a state that has extended its jurisdictional reach to or near the limits permitted by the Constitution, it probably makes little difference whether state or federal law controls, since the two will be virtually identical."

residents would be homogenized into the common-law jurisdictions.

How will we the people know if the experiment to extend property law protection in revendication to Louisiana residents works or not if the experiment is aborted mid-term by the Due Process Clause?

The way things stand, there is, for all intents and purposes, a federal standard of review that sacrifices the unique character and culture of each state on the altar of uniformity. The case at bar is but one instance of many situations that simply do not rise to a level of Constitutional significance. Issues such as are presented here are best left to the State legislatures, the State tribunals, and to the federal circuit most familiar with the State's laws.

D. The Due Process Clause defense was improvidently entertained in this case.

The Constitutional issue is improvidently addressed where Petitioner's state-law created cause of action is one for Revendication of tangible personal property by the owner, and the defendant admits that his muniment of title derives from Petitioner.

The Respondent, under the forum state's law, is nothing more than a precarious possessor. The non-resident New York precarious possessor has no federally protected property interest upon which to base a Due Process Clause defense to Louisiana's assertion of *in personam* jurisdiction against the true owner, unless the

Court reaches the Constitutional issue by extending the 14th Amendment's protection against deprivation of a property right to a mere precarious possessor of master recordings presently owned by Petitioner[19].

There is simply no other source of "property interest" available to the Respondent, other than the possessory interest of the precarious possessor under the cause of action in revendication, where Respondent has been properly served through the Louisiana Long-Arm Statute, and has elected the federal forum through removal procedure from Louisiana State court.

Even if Respondent's mere possessory interest, the slimmest of all reeds of property under Louisiana law, does rise to the level of availing Respondent of the Due Process Clause defense, such defense ought not be entertained nor addressed until and unless the substantive cause of action is at least asserted under the state's Long-Arm Statute and considered[20], or else the dual instant proceedings on summary judgment become fundamentally unfair to the Petitioner, who is the party alleging in the first instance a deprivation of the

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[19] "The man that hath no music in himself... let no such man be trusted." Shakespeare, Merchant of Venice, Act 5, sc. 1.

[20] See, e.g. Arrowsmith, Ibid., at 223: "There thus exists an overwhelming consensus that the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee."

possessory instance in property that Petitioner presently owns[21].

Once Respondent sets up its defense of title ownership to the property (see Answer, App. G, Affirmative defenses pp.76-81), then *a fortiori* 28 U.S.C. 1652, the jurisprudence thereunder, and notions of comity amongst the Several States dictate that state law ought to continue as the governing law.

However, the Second Circuit has said it need not consider this "unfamiliar"[22] Louisiana law in order to affirm the dismissal of this action under the Due Process Clause. The Second Circuit has entered the Constitutional dimension prematurely and improvidently.

What basis is there in the Constitution or in the United States Code for a federal court, sitting in diversity, to re-characterize Petitioner's substantive state-law created cause of action in Revendication as the common-law delictual action of conversion? (App. D, P. 58). There is none, and such a notion of comity[23] between the laws of the Several States may not be permitted to stand unaddressed.

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[21] See Plaquemines Parish, fn. 4, supra.

[22] (App. D P. 55, fn.12).

[23] Not to mention comity between co-equal courts. The Fifth Circuit has taken great pains to explain that revendication is a real action in property, not a tort, and thus not subject to liberative prescription (delictual limitations period) SongByrd I, at 777-80. (App. B, pp. 14-22).

The *in personam* jurisdiction issue implicated in this case is made out to be an issue of Constitutional import every day in every court in the land. The only common element your Petitioner sees in these matters is that the duty to avoid the Constitutional issue is "more honour'd in the breach than the observance"[24].

II.
The Problematic Transfer Order In This Case Is Indicative Of Systemic Overreaching In Diversity Matters Involving Personal Jurisdiction

Constitutional overreaching is at the heart of the problem with the transfer order (App. E, pp.64-5). In this very case, the Second Circuit simply made up a rule[25] for all future civil victims of the transfer morass: Move the transferee court for retransfer to the transferor court, suffer the denial of the motion ("to make it clear that its opposition in the transferor court was serious" App. D, pp. 49-50), and then the appellate court embracing the transferee's district will have the power and jurisdiction to review the transferor court's transfer order, through the constructive fiction of the denial of the motion to retransfer in the transferee court.

This approach merely treats the symptom and not the cause. Had the Eastern District judge ruled on *in personam* jurisdiction instead of pretermitting it, the Fifth Circuit

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[24] Shakespeare, Hamlet, Prince of Denmark act 1, sc. 4, ln. 34.

[25] App. D, p. 49.

would have had the authority to entertain the issue[26]. Further, had the Eastern District judge, on remand, dismissed for want of personal jurisdiction, your Petitioner would have appealed directly to the Fifth Circuit. In either circumstance, the Second Circuit would not have been faced with this problematic transfer order.

The instant litigation presents the opportunity to search the collective trust of the Court for a penetrating answer and for stern guidance in the avoidance of resort to the Constitution. Not every Article III judge need decide important Constitutional questions in every case on the docket, good behavior notwithstanding.

However, in diversity cases, the question of in personam jurisdiction ought follow the rule of Arrowsmith and be addressed first, under applicable state law, and only as a matter of last resort ought be decided under the power of judicial review.

The duty to avoid the Constitutional issue if lesser (state or federal) grounds are available for decision is not only sound, but also it preserves the wellspring of the Constitution itself, and thereby the Nation. It is the manifest duty of the Court to protect and defend the Constitution at all costs, even as against a well-meaning judiciary.

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[26] The case on appeal to the Fifth Circuit was in precisely the same procedural posture as Arrowsmith, Ibid. But there, the Second Circuit properly vacated the order of the district court and remanded with instructions to address *in personam* jurisdiction first.

CONCLUSION

For the reasons argued herein, the Court should grant the writ of certiorari to entertain one or more of the questions presented for review.

Respectfully submitted,

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(2) FILED

No. 992018 JUN 08 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SONGBYRD, INC.,

Petitioner,

vs.

ESTATE OF ALBERT B. GROSSMAN, D/B/A BEARSVILLE RECORDS

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SONGBYRD, INC.	CIVIL ACTION
VERSUS	NO. 95-3706
BEARSVILLE RECORDS, INC., ET AL.	SECTION T(1)

DATE OF ENTRY: June 19, 1996

ORDER

PORTEOUS, District Judge.

Before the Court is defendant's Motion to Dismiss. The motion was taken under submission after oral arguments on the 29th day of January 1996. After a review of the record, the memoranda filed by counsel, and the applicable law, defendant's Motion to Dismiss is hereby **GRANTED**.

I.) BACKGROUND

Defendant, The Estate of Albert B. Grossman d/b/a Bearsville Records ("the Estate") is a successor to Bearsville Records, Inc. ("Bearsville, Inc"), a New York corporation which was dissolved in 1988. The Estate operates a recording studio located in Woodstock, New York as its primary business function.

Plaintiff, successor in interest to all rights and causes of action of Henry Roeland Byrd p/k/a Professor

Longhair, and his deceased wife, Alice Byrd, has sued the Estate alleging various claims which all concern certain master recordings by Professor Longhair which the Estate contends that it or its predecessor has owned since 1972. Plaintiff seeks the return of these recordings which it claims are being wrongfully detained by the defendant.

II.) PLAINTIFF'S ACTION HAS PRESCRIBED

Defendant has moved to dismiss the action based on prescription, or in the alternative, lack of personal jurisdiction over the defendant. The Court believes that the plaintiff's claims are barred whether they are based in contract, quasi-contract, or tort. La. C.C. Art. 3499 provides "unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years". While La. C.C. Art. 3492 provides:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

The first demand for these tapes was made over 20 years ago by Professor Longhair's attorney in letters dated January 9th and March 7th of 1975. Because 20 years have passed between the demand letters and this suit, the action has long since prescribed. Between 1975 and Professor Longhair's death in 1980, no suit was filed. Additionally, after Professor Longhair's death in 1980, his heirs and successors also neglected to file suit in this matter. It is only now, after 21 years from the demand

letters and 24 years since the recordings were sent, that the plaintiff has decided to take legal action.

The plaintiff argues that the defendant is a precarious possessor and based on the precarious nature of the possession, prescription has not tolled. This Court, respectfully, disagrees. La. C.C. Art. 3437 states that the "exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession." (emphasis added). In the instant case, it is clear from SongByrd's petition that Bearsville has not had the plaintiff's permission to possess the tapes for over fifteen years. Paragraph XIII of the plaintiff's petition states, "Despite repeated requests over the ensuing 15 years for return of said demonstration tapes, Bearsville failed to return the demo tapes." La. C.C. Art. 3438 states "a precarious possessor, such as a lessee or a depositary, is presumed to possess for another although he may intend to possess for himself." In regards to the termination of precarious possession, La. C.C. Art. 3439 states, "Any other precarious possessor, or his universal successor, commences to possess for himself when he gives actual notice of this intent to the person on whose behalf he is possessing." Even if it could be said that the defendant was a precarious possessor, defendant gave actual notice that they intended to possess for themselves by refusing to return the tapes for over 21 years and licensing the recordings to third parties in consideration for the right to receive royalty income.

III.) THE STANDARD FOR SUMMARY JUDGMENT HAS BEEN MET.

While defendant has moved to dismiss under Federal Rules of Civil Procedure 12(b)(6), failure to state a claim upon which relief can be granted, Rule 12 further provides that

> If...matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment... See Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (1985).

Both plaintiff and defendant have included exhibits which are "matters outside the pleadings", as such, the motion will be treated as one for summary judgment.

Federal Rule of Civil Procedure 56(c) states that summary judgment shall be rendered when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Federal Rules of Civil Procedure 56(c). The Fifth Circuit has explained that "[t]he Supreme Court has defined material facts as those that will affect the outcome of the lawsuit under governing law." Meyers v. M/V Eugenio C, 919 F.2d 1070, 1072 (5th Cir. 1990); citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

Accordingly, it is this Court's opinion that any claims plaintiff may have had to the master recordings have long since prescribed. This serves as the basis for granting the

defendant's Motion for Summary Judgment. Therefore, defendant's second contention that this Court lacks personal jurisdiction over both the Estate and Bearsville, Inc. need not be addressed.

IT IS ORDERED that defendant's Motion for Summary Judgment is hereby **GRANTED**.

Appendix B

United States Court of Appeals
For the Fifth Circuit.

SONGBYRD, INC., Plaintiff – Appellant,

v.

BEARSVILLE RECORDS, INC.; Albert B. Grossman, Estate of, erroneously sued as Bearsville Records, Inc., doing business as Bearsville Records, Defendants – Appellees.

No. 96-30670
Summary Calendar.

Feb. 4, 1997.

Appeal from the U.S. District Court for the Eastern District of Louisiana.

Justin Asher Zitler, New Orleans, LA, for plaintiff-appellant.

Christina H. Belew, Denise C. Puente, Simon, Peragine, Smith & Redfearn, New Orleans, LA, for defendants-appellees.

Before HIGGINBOTTOTHAM, DAVIS, and WEINER, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant SongByrd, Inc. (SongByrd) appeals from the district court's dismissal of its action

seeking to recover from Defendant-Appellee the Estate of Albert B. Grossman d/b/a Bearsville Records (Bearsville), several master tapes recorded by a legendary New Orleans musician. Concluding that (1) the district court improperly classified SongByrd's suit as a personal rather than a real action, (2) real actions are imprescriptible under Louisiana law, and (3) Bearsville has yet to establish that it gave SongByrd's predecessors- in-interest actual notice of Bearsville's intent to possess the tapes for itself, we reverse the district court's summary judgment ruling and remand for further proceedings consistent with this opinion.

I.
FACTS AND PROCEEDINGS

The late Henry Roeland Byrd, also known as "Professor Longhair," was an influential New Orleans rhythm-and-blues pianist and composer, and is widely regarded as one of the primary inspirations for the renaissance of New Orleans popular music over the last thirty years. His numerous hits included original compositions such as "Tipitina" and "Go to the Mardi Gras," as well as his famous renditions of Earl King's "Big Chief." After achieving modest commercial success as a local performer and recording artist in the 1940's and 1950's, Byrd fell on hard times during the 1960's. His fortunes began to change for the better in 1970, however, when New Orleans music aficionado Arthur "Quint" Davis, along with others, founded the New Orleans Jazz and Heritage Festival ("JazzFest"). Needing talented

performers for JazzFest, Davis located Byrd in 1971 working in an obscure record store in New Orleans and transformed him into a perennial star attraction of the JazzFest and other venues from that time until his death in 1980.[1]

Soon after Byrd's first performance at JazzFest, Davis, acting as the pianist's manager, and Parker Dinkins, an attorney, arranged for Byrd to make several "master recordings" at a Baton Rouge recording studio known as Deep South Recorders. These master recordings consist of four reels of 8-track tape which could be "mixed" to produce either demonstration tapes or final recordings suitable for the production of records, cassettes, and compact discs. According to SongByrd, several demonstration tapes produced from these master recordings found their way to Bearsville Records, Inc., a recording studio and record company located in Woodstock, New York and operated by Grossman. Impressed by the demonstration tapes, Grossman apparently arranged with Davis and Dinkins for Byrd and another New Orleans musician to travel to Bearsville's studio for a recording session.

For reasons that are unclear but not material to this appeal, the Bearsville recording sessions proved unsatisfactory. For equally unclear reasons, Davis and

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[1] These uncontroverted background facts are recounted in the liner notes to the album, Professor Longhair, Houseparty New Orleans Style: The Lost Sessions 1971-72, Rounder Records (1987), which SongByrd submitted as an exhibit in response to Bearsville's motion to dismiss.

Dinkins wanted Grossman to be able either to listen to or play for others the full version of the Baton Rouge master recordings. In furtherance of this desire, Davis and Dinkins caused the four "master recording" tapes to be delivered to Grossman in New York. According to the as yet unrefuted affidavit of Davis, these tapes were delivered to Grossman, "as demonstration tapes only, without any intent for either Albert Grossman or Bearsville Records, Inc. to possess these aforementioned tapes as owner." Also for reasons as yet not explained by either party, the tapes remained in Grossman's possession for many years thereafter.

Acting on behalf of Davis and Byrd in 1975, Dinkins wrote two letters to Bearsville--the first addressed to a George James, the second to Grossman himself--requesting that Bearsville return the master recording tapes. Bearsville made no response whatsoever to Dinkins' letters (or at least has not introduced any evidence of a response). Dinkins, for reasons as yet unknown, did not press his request any further.

After Albert Grossman's death in the mid 1980's, Bearsville Records, Inc. was dissolved, but Grossman's estate continued to do business as "Bearsville Records." Even though it no longer signs artists or promotes their products, Bearsville Records still operates a recording studio which it leases to record labels and third parties; it also licenses a catalog of recordings by artists originally under contract with Bearsville Records, Inc. Acting in this latter capacity, Bearsville licensed certain of the Byrd master recordings to Rounder Records Corporation of

Cambridge, Massachusetts (Rounder) for an advance against royalties.

In 1987, Rounder released Professor Longhair, Houseparty New Orleans Style: The Lost Sessions, an album that contained 11 songs or "tracks" made from Byrd's original Baton Rouge master recordings. This release garnered Byrd a posthumous Grammy Award for Best Traditional Blues Album of 1987. The liner notes of the Rounder album make hardly any reference to Bearsville and no reference whatsoever to the contractual agreement between Rounder and Bearsville.[2] Bearsville Records also licensed certain of the master recordings to another record company, Rhino Records (Rhino). According to SongByrd's petition, Rhino released an album, titled "Mardi Gras in Baton Rouge," featuring seven tracks from the Baton Rouge master recordings.

In 1993, SongByrd, Inc. was incorporated and commenced business as successor- in-interest to the intellectual property rights of Byrd and his deceased widow, Alice Walton Byrd. In 1995, SongByrd filed this lawsuit in state court in New Orleans against Bearsville Records, Inc. SongByrd's "Petition in Revendication" sought a judgment (1) recognizing its ownership of the master recordings, (2) ordering return of the recordings,

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[2] The only oblique reference to Bearsville is found in the third section of the liner notes authored by "The Rounder Folks" and states: "Sadly these tapes [the Baton Rouge master recordings] were not released, but instead languished at Bearsville, their absence unremarked and unnoticed except among collectors and a few cognoscenti."

and (3) awarding damages. Bearsville timely removed the suit to federal court and subsequently filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) and (6), asserting (a) lack of personal jurisdiction over Bearsville and (b) failure of SongByrd to state a cause of action because SongByrd's claims were barred by liberative prescription under Louisiana law. As both parties submitted affidavits and exhibits outside the pleadings, however, the district court correctly treated Bearsville's motion to dismiss as a motion for summary judgment under Fed.R.Civ.P. 56(c).[3] Pretermitting the question of personal*776 jurisdiction, the district court then granted the motion and dismissed SongByrd's case. The court held that SongByrd's action was barred by liberative prescription and also rejected SongByrd's argument that at all times Bearsville has been only a precarious possessor and therefore prescription has never commenced to run. SongByrd timely filed its notice of appeal from the district court's ruling.

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[3] Although defenses are generally not the proper subject of Rule 12(b)(6) motions, certain affirmative defenses that clearly appear on the face of the plaintiff's complaint--most commonly that the statute of limitations has run--may properly be asserted in a Rule 12(b)(6) motion. See Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas, 20 F.3d 1362, 1366 (5th Cir. 1994); 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357, at 352 (1990). As Bearsville submitted affidavits and exhibits in support of its 12(b)(6) motion asserting the affirmative defense of liberative prescription, however, the court rectified any potential pleading deficiency by treating Bearsville's motion as one for summary judgment under Rule 56(c).

II.
ANALYSIS

A. Standard of Review

When a district court treats a Rule 12(b)(6) motion as a motion for summary judgment under Rule 56(c) because matters outside the pleadings are presented to and not excluded by the court, we review the grant of such a motion just as we would any other grant of summary judgment--that is, we review the grant of summary judgment de novo and apply the same legal standards as the district court.[4] Accordingly, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[5] Further, we construe all evidence in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes.[6]

B. Applicable Law--Erie-Bound

1. Special Louisiana Erie Considerations

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[4] Morin v. Caire, 77 F.3d 116, 123 (5th Cir. 1996); Nat. Ass'n of Govern. Emp. v. City Public Serv. Bd. of San Antonio, Tex., 40 F.3d 698, 712 (5th Cir. 1994).

[5] Fed.R.Civ.P. 56(c).

[6] Williams v. Time Warner Operation, Inc., 98 F.3d 179, 181 (5th Cir. 1996).

The basis of our jurisdiction, and that of the district court, to decide the instant case is diversity of citizenship, under which a federal court's obligation is to apply substantive state law. In Louisiana this obligation has special dimensions because of our unique Civilian tradition. We remain ever aware of the late Judge Rubin's caution to federal Erie courts applying Louisiana Civil law to steer clear of the common law principle of stare decisis and to apply instead the distinctly Civilian doctrine of jurisprudence constante:

> Because of the reviewing power of [Louisiana] appellate courts, the [Louisiana] trial judge may pay great respect to the decisions of these courts. He is not bound to do so, however, because the doctrine of stare decisis does not apply. Instead, each judge, trial and appellate, may consult the civil code and draw anew from its principles. Interpretation of the code and other sources of law is appropriate for each judge. The judge is guided much more by doctrine, as expounded in legal treatises by legal scholars, than by the decisions of colleagues.... Instead of stare decisis, the rule is one of deference to a series of decisions, jurisprudence constante.[7]

Emphatically elaborating on the proposition that Erie "does not command blind allegiance to [any] case on all

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[7] Alvin B. Rubin, Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad, 48 La.L.Rev. 1369, 1372 (1988) (citations omitted) (emphasis in original).

fours with the case before the court,[8]" now-Chief Judge Politz wrote that:

> If anything, this flexibility is even greater when a federal court sits as a Erie court applying the Louisiana civil law. In such cases, "the Erie obligation is to the [Civil] Code, the 'solemn expression of legislative will.' " Shelp, 333 F.2d at 439 (quoting the very first article of the Louisiana Civil Code). The Louisiana Supreme Court has taken great pains to "plainly state that ... the notion of stare decisis, derived as it is from the common law should not be thought controlling in this state." Ardoin v. Hartford Acc. & Indem. Co., 360 So.2d 1331, 1334 (La.1978). While caselaw in the State of Louisiana is acknowledged as "invaluable as previous interpretation ..." [id. at 1335], it is nonetheless properly regarded as "secondary information." Id. at 1334.[9]

2. Prescription

The central issue in the instant appeal is whether plaintiff's action is time barred. The answer to this

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[8] Shelp v. National Surety Corp., 333 F.2d 431, 439 (5th Cir.), cert. denied, 379 U.S. 945, 85 S.Ct. 439, 13 L.Ed.2d 543 (1964).

[9] Green v. Walker, 910 F.2d 291, 294 (5th Cir. 1990) (footnotes omitted) (emphasis added). See also Principal Health Care of Louisiana, Inc. v. Lewer Agency, Inc., 38 F.3d 240, 245 n. 6 (5th Cir. 1994) ("Louisiana, being the only civil law jurisdiction among the fifty states, is unique in that its approach to solving most legal questions begins first and foremost with a review of the Louisiana Civil Code. The Civil Code is thus the civilian's 'Bible.' Jurists in common law jurisdictions, on the other hand, usually begin with a review of the case law on a particular issue.").

question depends on whether the applicable period of limitation--prescription in Louisiana; statute of limitations in the common law--is liberative or acquisitive. As shall be seen from our analysis of the pertinent provisions of the Louisiana Civil Code and from "legal treatises by legal scholars," the applicable type of prescription is acquisitive. And, as shall also be seen below, our analysis of Louisiana case law reveals that (1) this determination comports with implications of the most recent pronouncement of the Supreme Court of Louisiana, and (2) at the very least, the "jurisprudence" on point is not "constante," which frees us to pursue our own analysis of the Code, with the help of doctrinal writing.

C. Revindicatory Actions Are Imprescriptible

SongByrd contends that the district court erred when it determined that SongByrd's action seeking recognition of its ownership interest in the master recordings, return of those recordings, and damages, has prescribed under Louisiana law. The district court's memorandum order held that SongByrd's action had prescribed under Louisiana Civil Code Articles 3499 and 3492 regardless of whether SongByrd's claims were based in contract, quasi-contract, or tort. In so doing, the district court implicitly characterized SongByrd's action as a "personal action" arising from these areas of law. This characterization of SongByrd's action constitutes the first and fundamental error committed by the district court and led to its first erroneous holding.

[1] As explained by Professor A.N. Yiannopoulos in his treatise on Louisiana property law, actions seeking recognition of ownership or enforcement of the rights thereof, whether in movable or immovable property, are not personal actions; they are "real actions."[10] Such real actions, otherwise known as "revindicatory actions," are expressly authorized by the Louisiana Civil Code.[11] As the official comments to the Code make clear, there are two kinds of revindicatory action, depending on the object of the ownership interest that the plaintiff seeks to have recognized: (1) a "petitory action" for the recovery of immovable property (real estate), and (2) an "innominate real action" for the recovery of movable property (personalty).[12] Further, any "incidental demand for damages made in an action for the recovery of an immovable [or a movable] does not affect the classification of the main demand as a real action."[13]

[2] It follows from this basic dichotomy that, as the Civil Code specifically provides liberative prescription periods for all manner of personal actions (including delictual, contractual and quasi- contractual actions),[14]

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[10] A.N. Yiannopoulos, 2 Louisiana Civil Law Treatise § 241, 476 (1991).

[11] See La.Civ.Code art. 526.

[12] La.Civ.Code art. 526, cmt. b.; see also Yiannopoulos, supra, §§ 347 & 350, at 675-77 & 680-81 (on availability of real or revindicatory actions for the recovery of movable property under Louisiana law).

[13] Yiannopoulos, supra, § 242, at 477.

[14] See La.Civ.Code arts. 3492-3502.

"[l]iberative prescription does not bar real actions seeking to protect the right of ownership."[15] The rationale for this distinction is that "[u]nder our Civil Code, ownership can never be lost by the failure to exercise it--only by the acquisition of ownership by another through possession sufficient to acquire it through an acquisitive prescription."[16] Thus, it is well established in Louisiana that the petitory action (for the protection of immovables) is not barred by liberative prescription.[17] The same rule applies to the revindicatory action brought to assert or protect the right of ownership in movable property because it, too, is a real action, not a personal one. On this point Professor Yiannopoulos' Louisiana Civil Law Treatise could not be clearer:

> An action that is grounded on a wrongful act, that is, an offense or quasi-offense, is subject to the prescription of one year and an action grounded on quasi-contract is subject to the prescription of ten years. The revindicatory action [for the recovery of movable property] is imprescriptible; however, such an object is without object when the defendant has acquired the ownership of a movable by the acquisitive prescription of three or ten years.[18]

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[15] Yiannopoulos, supra, § 249, at 487.

[16] All-State Credit Plan Natchitoches, Inc., v. Ratliff, 279 So.2d 660, 666 (La.1972).

[17] Yiannopoulos, supra, § 249, at 487; see also Northcott Exploration Co. v. W.R. Grace & Co., 430 So.2d 1077, 1080 (La.Ct.App. 3rd Cir. 1983).

[18] Yiannopoulos, supra, § 358, at 692-93 (emphasis added).

Despite this obvious truism of Civilian doctrine,[19] a number of older Louisiana decisions overlooked or disregarded it and, just as the district court did here, applied either one-year or ten-year periods of liberative prescription on the erroneous assumption that the revindicatory action is personal in nature, either delictual[20] or quasi-contractual.[21]

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[19] See id. § 358, at 693, n. 5-8 (cases cited therein). Neither the briefs filed by the parties nor our independent research reflect even relatively recent treatment of this issue by the Louisiana Supreme Court, and the older case law is, at best, mixed. Cases from the 1920's and 1930's occasionally characterize as delictual (tort), actions involving alleged illegally or fraudulently appropriated movable property, and opinions from the 1930's and early 1940's classified as quasi-contractual or personal, actions seeking recovery of wrongfully taken movables or proceeds of involuntary alienation of movables.

[20] See, e.g., McGuire v. Monroe Scrap Material Co., 189 La. 573, 180 So. 413 (1938) (characterizing as delictual an action for value of movable property alleged to have been illegally and fraudulently appropriated); Carter-Allen Jewelry Co. v. Overstreet, 165 La. 887, 116 So. 222 (1928) (characterizing as delictual an action by jeweler alleging that salesman stole customer's ring or permitted someone else to steal it through his negligence).

[21] See, e.g., Kramer v. Freeman, 198 La. 244, 3 So.2d 609(1941) (plaintiff seeking recovery of wrongfully taken movables had cause of action in tort and quasi-contract, with pleadings indicating a waiver of tort action); Smith v. Phillips, 175 La. 198, 143 So. 47 (1932) (action by former homeowner to recover portion of proceeds of Sheriff's sale as homestead exemption characterized as personal action subject to ten-year liberative prescription under civil Code article 3544 (1870)).

Nevertheless, a 50-year old Louisiana Supreme Court case, Faison v. Patout,[22] appears to be the most recent pronouncement on point, and it supports our reading of the Civil Code and Professor Yiannopoulos' reading as well. In Faison, Mrs. Hypolite Patout executed a manual donation of her jewelry to her two daughters. Following the donor's death, one of her sons, Sebastian Patout, suggested to his sisters that it was unsafe for them to keep this jewelry in one sister's bedroom; so, with his sisters' permission, Sebastian put the jewelry in his bank safety deposit box. Sebastian died some twelve years later, whereupon his widow removed the jewelry from the safety deposit box and refused to give it to the sisters. In the sisters' suit to recover the jewelry, the trial court held, and the Louisiana Supreme Court agreed, that the sisters were the true owners. More significant to our consideration today, the Patout defendants (children of Mrs. Hypolite Patout's sons) had pled liberative prescription under Louisiana Civil Code article 3544 (1870). They contended that their aunts' action was personal and thus had prescribed because more than ten years had elapsed between the time the property left the aunts' possession and the time suit was filed. Rejecting this contention, the Supreme Court wrote:

> There might be some merit in a plea of prescription if Sebastian Patout had possessed the property for himself and the other heirs, and adversely to [his sisters], but the record convinces us that he was acting as depository for his two sisters, these

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[22] 212 La. 37, 31 So.2d 416 (1947).

> plaintiffs, and that his possession of the property was for their benefit--for them, and not in his own name or right.
>
> Counsel for defendants is in error in his contention that the ten-year [liberative] prescription under article 3544 commenced to run in March 1931 [when Sebastian took possession of the jewelry]. [Acquisitive] [p]rescription began to run when plaintiffs were first denied delivery of this jewelry in June 1942, after the death of their brother, Sebastian Patout, and this suit was filed in December 1942, about six months later.[23]

In thus rejecting the defendants' plea of liberative prescription, the Louisiana Supreme Court clearly recognized that the concepts of precarious possession and acquisitive prescription applied to this action for the recovery of movable property, even though the court did not use these terms of art. The facts in Faison are closely analogous to the situation before us today, and the holding of the Louisiana Supreme Court in Faison--the most recent pronouncement by the highest court of the state--is instructive despite being non-binding due to the inapplicability of the common law doctrine of stare decisis.[24]

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[23] Id. at 418-19 (emphasis added).

[24] See also Jeanfreau v. Jeanfreau, 182 La. 332, 162 So. 3 (1935) (owner of motorboat made simulated title transfer to his brother "for convenience sake only," never intending to relinquish actual ownership. In true owner's suit to recover the boat, defendant's plea of acquisitive prescription of three years under Louisiana Civil Code articles 496, 3506,

In sum, even though some decisions of the Louisiana Supreme Court have treated actions for recovery of movables as personal (delictual and occasionally as quasi-contractual), other decisions of that court have found that such actions are properly considered to assert claims of ownership and therefore are subject only to acquisitive prescription. Despite its age, Patout is still the most recent Louisiana Supreme Court pronouncement on point, and it so held. But regardless whether the most recent pronouncement of the Louisiana Supreme Court supports our analysis of the Civil Code and that of Professor Yiannopoulos, there is simply no jurisprudence constante on the question. It follows, then, that our Erie-bound decision to follow the plain wording and indisputable structure of the Louisiana Civil Code and Professor Yiannopoulos' analysis is either supported by or at least does no violence to Louisiana's jurisprudence as a secondary source of law. To the extent that our decision today may constitute an "Erie guess," we take additional comfort in the observation that almost 60 years have passed since the Louisiana Supreme Court last applied liberative prescription to actions claiming ownership or possession of movable property--a span of years attributable at least in part, we assume, to the broad reliance in recent decades on Professor Yiannopoulos' doctrinal work on this subject.

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and 3476 (1870) recognized implicitly by Louisiana Supreme Court as proper).

[3] As SongByrd's "Petition in Revendication" sought recognition of its purported ownership interest in the Baton Rouge master recordings and recovery of possession of those recordings, and only incidentally sought damages resulting from Bearsville's contravention of SongByrd's alleged ownership interest, we hold that, as a fundamental matter of Louisiana property law, SongByrd's action is not subject to liberative prescription.

D. Termination of Precarious Possession and Actual Notice

[4] This foundational holding does not end our analysis in the instant case, however. In addition to its failure to characterize SongByrd's suit as a real action and its concomitant error in applying the rules of liberative prescription, the district court also missed the mark in its treatment of SongByrd's assertion that Bearsville was and is only a precarious possessor. To situate the concept of precarious possession in its proper Civilian context, we again return to basics. As Professor Yiannopoulos explains, a defendant in possession (such as Bearsville) may defend a revindicatory action for the recovery of movable property by (1) asserting some right, be it personal or real, to possess the movable, or (2) claiming that he is in fact the owner of the movable by virtue of, e.g., a transfer from the owner, acquisitive prescription, or some other mode of acquiring ownership.[25] No such defenses have been proffered by Bearsville; but if, on

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[25] Id. § 354, at 687.

remand, it should assert the defense of acquisitive prescription, the district court will have to address SongByrd's contention--made both in its original petition and in opposition to Bearsville's motion to dismiss--that Bearsville is and always has been nothing more than a precarious possessor.

Under the Civil Code, the concept of "precarious possession" is defined within Title XXIII of Book III, "Of the Different Modes of Acquiring the Ownership of Things," as "the exercise of possession over a thing with the permission of or on behalf of the owner or possessor."[26] A precarious possessor is presumed to possess for another,[27] but precarious possession may be terminated or converted to possession on one's own behalf in either of two specific ways. First, a precarious possessor who is a co-owner (or his universal successor) may terminate his precarious possession, and thus begin to possess for himself alone, only when he demonstrates his intent to possess for himself by "overt and unambiguous acts sufficient to give notice to his co-owner."[28] Second, a precarious possessor who is not a co-

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[26] La.Civ.Code art. 3437.

[27] La.Civ.Code art. 3438. Conversely, "[o]ne is presumed to intend to possess as owner unless he began to possess in the name of and for another." La.Civ.Code art. 3427 (emphasis added). This presumption set forth in article 3427 in favor of a person who exercises factual authority does not arise, however, when "there is proof that the possession was precarious at its inception." Yiannopoulos, supra, § 370, at 617.

[28] La.Civ.Code art. 3439.

owner is held to a higher standard and only "commences to possess for himself when he gives actual notice of this intent to the person on whose behalf he is possessing."[29]

In the instant case, then, should Bearsville assert that it acquired ownership of the master recordings by acquisitive prescription of either three or ten years, pursuant to Louisiana Civil Code Articles 3489-91, it will have to overcome SongByrd's assertion, so far supported by Quint Davis' affidavit, that Davis and Dinkins delivered the master recordings to Bearsville intending only for Bearsville to possess the tapes precariously. Bearsville may, of course, assert that (1) it was never a precarious possessor, or (2) even if it was a precarious possessor initially, at some point it terminated its precarious possession and began to possess for itself. Either way, Bearsville will have the burden of proving facts sufficient to support such a defense.

[5] It is the non-co-owner context in which we finally address the district court's alternative--and, strictly

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[29] Id. (emphasis added). Another respected Louisiana commentator has observed (1) that the "actual notice" required to convert precarious possession to adverse possession constitutes a more stringent standard than was needed prior to the 1983 revision of Title XXIII of Book III of the Louisiana Civil Code dealing with occupancy, possession and acquisitive prescription, Symeon Symeonides, Property, 46 La.L.Rev. 655, 680 (1986), and (2) that the "overt and unambiguous acts sufficient to give notice" standard imposed on co-owners is "a less exacting burden of proof" than the "actual notice" standard imposed on other precarious possessors. Symeon Symeonides, One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription, 44 La.L.Rev. 69, 86 (1983).

speaking, premature--holding that Bearsville's failure to respond to Dinkins' letters requesting return of the tapes in 1975 and its later licensing agreements with Rounder and Rhino, constituted "actual notice" sufficient to convert Bearsville's precarious possession as a matter of law. This ruling, we observe, is clearly inconsistent with Louisiana law.

[6] We have not been able to locate (and Bearsville has not cited to us) a single Louisiana case that supports the novel proposition that alone either (1) a minimal, apparently clandestine action--such as entering into a contractual agreement with a third party to enjoy the fruits of a movable without directly informing the owner of the movable of that agreement--or (2) mere inaction in the face of a request for a return of the movable to its owner, can somehow constitute "actual notice" for purposes of terminating precarious possession of the movable of a non-co-owner.[30] To the contrary, recent Louisiana cases concerning termination of precarious possession reflect that the notice burden imposed on

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[30] The two cases cited by Bearsville which held that mere silence or passivity is insufficient to bring the doctrine of contra non valentum into play are clearly inapposite as that doctrine concerns the interruption of liberative prescription of personal actions not acquisitive prescription in the context of real actions. See Cyr v. Louisiana Intrastate Gas Corp., 273 So.2d 694, 697-98 (La.Ct.App. 1st Cir. 1973); Colley v. Canal Bank & Trust Co., 159 F.2d 153, 154 (5th Cir. 1947).

precarious possessors in such instances is much more stringent.[31] As one court put it,

> a possessor whose possession begins other than as an owner must do something to make generally known that he has changed his intent and he must prove specifically when he manifested to others his intent to possess as owner. Continued physical possession alone does not suffice to rebut the presumption that the possession remains precarious. The character and notoriety of the possession must be sufficient to inform the public and the record owners of the possession as owner.[32]

We therefore conclude that actual notice sufficient to convert or terminate precarious possession cannot be

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[31] See e.g., Robin v. Finley, 597 So.2d 178, 180 (La.Ct.App. 3rd Cir. 1992) ("actual notice" sufficient to begin acquisitive prescription not given until precarious possessors filed a possessory action); Satsuma Pentecostal Church v. Harris, 563 So.2d 1247, 1249 (La.Ct.App. 1st Cir. 1990) (church that was a precarious possessor did not begin to possess for itself for purposes of instituting a possessory action under La.Code Civ. Proc. art. 3658(2) until church's representative voiced objection to owner's proposed sale of property and clearly notified owner that church claimed ownership); Morris v. Sonnier, 546 So.2d 1296, 1300 (La.Ct.App. 1st Cir. 1989) (acts of corporeal possession are insufficient to constitute "actual notice" for precarious possessors who began possession as lessees); Feazel v. Howard, 511 So.2d 1306, 1308-09 (Ct. App. 2nd Cir.), writ denied, 514 So.2d 456 (La.1987) (precarious possessor did not give "actual notice" to owner that he intended to possess for himself as he admitted at trial that he never made an assertion of ownership of disputed tract).

[32] Hammond v. Averett, 415 So.2d 226, 227 (La.Ct.App. 2nd Cir. 1982) (citations omitted).

based solely on either minimal and apparently clandestine actions such as those described above or on merely standing mute in the face of a direct inquiry or request for return of the property.

This is not to say, of course, that the defendant may not refer to these facts in a subsequent motion for summary judgment or a full evidentiary hearing should Bearsville eventually assert that at some point it began to possess the master recordings for itself and gave SongByrd's predecessors-in-interest actual notice of such an intention. Doubtless these facts and others will have to be considered by the trier of fact in resolving such an acquisitive prescription defense in general and the actual notice issue in particular. We simply hold today that the limited evidence presented to the district court on Bearsville's motion to dismiss-cum-summary judgment, on the ground of liberative prescription, was insufficient to determine that Bearsville satisfied the high burden of proof necessary to establish that it gave SongByrd's predecessors-in-interest actual notice of its intent thenceforth to possess for itself, converting its precarious possession to adverse possession for the purpose of acquisitive prescription.

III.
CONCLUSION

For the reasons stated above, we reverse the district court's grant of summary judgment in favor of Bearsville and remand the case for further proceedings consistent with this opinion. On remand, the district court is free to

address the personal jurisdiction question that it pretermitted in its summary judgment ruling, an issue which is not before us on this appeal and on which we express no opinion at this juncture.

REVERSED and REMANDED.

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

23 F.Supp.2d 219

SONGBYRD, INC., Plaintiff,

v.

ESTATE OF ALBERT B. GROSSMAN, dba Bearsville Records, Inc., Defendant.

Oct. 21, 1998

Heslin & Rothenberg, P.C., Albany, NY (Robert E. Heslin, of counsel), Justin A. Zitler, New Orleans, LA, for Plaintiff.

Ryan, Orlando & Smallacombe, LLP, Albany, NY (Melissa J. Smallacombe, Mario D. Cometti, of counsel), Simon, Peragine, Smith & Redfearn, New Orleans, LA (Christina H. Belew, of counsel), for Defendant.

HOMER, United States Magistrate Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff SongByrd, Inc. ("SongByrd") brought this action seeking monetary damages and a declaration of rights in certain recorded music tracks. Presently pending is a motion by defendant Estate of Albert B. Grossman, doing business as Bearsville Records, Inc. ("Bearsville")

for summary judgment pursuant to Fed.R.Civ.P. 56 on the ground that the action is barred by the applicable statute of limitations. Docket No. 40. SongByrd opposes the motion. Docket No. 43. For the reasons which follow, the motion is granted.

I. Facts[1]

This case concerns the possession, ownership, and usage of several master recordings of musical performances made in the early 1970's by New Orleans musician Henry Roeland Byrd, who was professionally known as "Professor Longhair" ("Byrd").[2] The tapes were produced in a Baton Rouge, Louisiana recording studio and soon thereafter came into the possession of a predecessor in interest to Bearsville located in Woodstock, New York. Over time several requests have been made by representatives of Byrd to secure return of the tapes. Cometti Aff. (Docket No. 40), ¶ 10. It is unclear what if any response those requests received, but the tapes have remained in the physical custody of Bearsville continuously since the 1970's. Id. at ¶ 11.

In August 1986, Bearsville licensed certain of the master recordings to Rounder Records Corporation, which

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[1] The undisputed facts of this matter, including its musical background and context, are detailed in an earlier opinion from the Fifth Circuit. Court of Appeals. See SongByrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 774-75 (5th Cir.1997).

[2] SongByrd incorporated in 1993 and conducts business as a successor in interest to Byrd.

in 1987 released an album of Byrd's music produced from the recordings. Cometti Aff., ¶ 12. In 1991, another recording based on the disputed master recordings was released by Rhino Records. That release was made possible by a licensing agreement between Bearsville and the production company. Id. at ¶ 13.

II. Procedural Background

Originally filed in Louisiana state court in 1995, this action was removed by Bearsville to the United States District Court for the Eastern District of Louisiana. Docket No. 1. Bearsville then moved pursuant to Fed.R.Civ.P. 12(b) to dismiss the claim on the ground that the court lacked personal jurisdiction and the claim was barred by Louisiana's period of prescription.[3] The district court held that the action was barred by the applicable prescriptive period and granted the motion without addressing the jurisdictional question. SongByrd, Inc. v. Bearsville Records, Inc., Civ.A. No. 95-3706, 1996 WL 337259 (E.D.La. June 18, 1996). SongByrd appealed and the Fifth Circuit Court of Appeals reversed, holding that the claim was not prescribed under Louisiana law. 104 F.3d 773, 779 (5th Cir.1997). On remand, the district court considered the question of personal jurisdiction, concluded that jurisdiction was lacking, and transferred

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[3] The period of prescription in civil law jurisdictions like Louisiana is roughly synonymous with the common law concept of a statute of limitations. See FDIC v. Barton, 96 F.3d 128, 131 n. 2 (5th Cir.1996).

the action to this district. Docket No. 40, Ex. E. The present motion followed.

III. Summary Judgment Standard

Under Fed.R.Civ.P. 56(c), if there is "no genuine issue as to any material fact ... the moving party is entitled to judgment as a matter of law, ... where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The moving party bears the burden of demonstrating that no genuine issue of material fact exists. FDIC v. Giammettei, 34 F.3d 51, 54 (2d Cir.1994); see also Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir.1975). Once the movant has come forward with sufficient evidence in support of the motion for summary judgment, the opposing party must 'set forth specific facts showing that there is a genuine issue for trial" and cannot rest on "mere allegations or denials" of the facts asserted by the movant. Fed.R.Civ.P. 56(e); Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525-26 (2d Cir.1994).

The trial court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. American Cas. Co. of Reading, Pa. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir.1994); see also Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir.1985). "Furthermore, the non-movant 'will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant.' "

Samuels v. Mockry, 77 F.3d 34, 36 (2d Cir.1996) (citations omitted).

IV. Discussion

A. Choice of Law

When venue is originally placed in one jurisdiction and then transferred to another, it is generally the law of the transferor jurisdiction that applies in the new court. Ferens v. John Deere Co., 494 U.S. 516, 523, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990); Van Dusen v. Barrack, 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). An exception exists when the transfer is made on the ground that the venue was improperly laid in the first instance, i.e., that the original court lacked personal jurisdiction over the defendant, rather than simply for the convenience of the parties. In those cases the transferee court applies the law of the forum in which it sits. Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1532 (10th Cir. 1996); Muldoon v. Tropitone Furniture Co., 1 F.3d 964, 967 (9th Cir. 1993); Manley v. Engram, 755 F.2d 1463, 1467 n. 10 (11th Cir. 1985); Davis v. Louisiana State Univ., 876 F.2d 412, 414 (5th Cir. 1989). The exception applies here because this action was transferred on the ground that the Louisiana court lacked jurisdiction. Docket No. 40, Ex. E. Both parties agree that under these circumstances, disposition of this case is governed by New York law. *222

B. New York Statute of Limitations

This action is governed by the three-year statute of limitations for recovery of chattel provided in N.Y. Civ.

Prac. L. & R. § 214(3) (McKinney 1990) Johnson v. Smithsonian Inst., 9 F. Supp.2d 347, 354 (S.D.N.Y. 1998) (New York statute of limitations for conversion and replevin is three years). The issue presented here is when the claim accrued for statute of limitations purposes.

The statute of limitations for conversion begins to run at the time of the conversion. Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 462 N.Y.S.2d 413, 416, 448 N.E.2d 1324 (1983); see also Vigilant Ins. Co. of Am. v. Housing Auth. of the City of El Paso, Tex., 87 N.Y.2d 36, 637 N.Y.S.2d 342, 347, 660 N.E.2d 1121 (1995). In Sporn, New York's Court of Appeals was presented with a case very similar to the case at bar. There, the plaintiff, the successor in interest to the purported owner of rights in certain master recordings, sued the defendant record company for commercially exploiting the master recordings contrary to the plaintiff's interests. Sporn, 462 N.Y.S.2d at 414-15, 448 N.E.2d 1324. The record company defended on the ground that the three-year limitations period had begun to run at the time it began using the master recordings contrary to the plaintiff's purported interest and had expired prior to the commencement of the action. Holding that the statute of limitations for conversion begins to run at the time of the conversion, the Court of Appeals affirmed the grant of summary judgment in favor of the record company. Id. 462 N.Y.S.2d at 416.

SongByrd contends that Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991) ("Guggenheim"), not Sporn, governs this action. In Guggenheim, the New York Court of

Appeals held that "a cause of action for replevin against a good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it." Id. 567 N.Y.S.2d at 626. SongByrd argues that under Guggenheim the statute of limitations does not begin to run until after a demand for return has been refused, that such a demand has been made but not refused here and as a result the limitations period has not yet begun to run. Guggenheim, however, addresses the different circumstance of possession of a chattel by a bona fide purchaser for value and does not, therefore, provide the controlling rule of law here.

Guggenheim, in fact, recognized that a different rule applies when the stolen chattel remains in the possession of the thief. Citing Sporn, the court stated that in such a circumstance the statute of limitations begins to run from the time of the theft. Guggenheim, 567 N.Y.S.2d at 626, 569 N.E.2d 426. Here, the chattel at issue has remained in the possession of Bearsville, the party alleged to have committed the wrongful taking. There is no evidence that Bearsville was ever a bona fide purchaser for value. Thus, the statute of limitations here began to run at the time Bearsville converted the master recordings. See Vigilant Ins. Co., 637 N.Y.S.2d at 347, 660 N.E.2d 1121 (in a case not involving a bona fide purchaser, a conversion claim accrues at the time of the conversion). Thus, Guggenheim is limited to circumstances involving a bona fide purchaser's possession of the chattel.

Having concluded that SongByrd's conversion claim accrued at the time of the conversion, the question becomes when the master recordings were allegedly converted. "The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner." Key Bank of N.Y. v. Grossi, 227 A.D.2d 841, 642 N.Y.S.2d 403, 405 (3d Dep't 1996). A party acts to the exclusion of the rights of another by exercising dominion and control over the property that is inconsistent with the interests of the true owner. Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 682 (S.D.N.Y. 1987). Accepting this definition of conversion, the decisive issue is when Bearsville began unauthorized possession of the master recordings.

Bearsville undeniably had lawful and authorized possession of the master tapes when they were first transferred to its predecessor in 1972. In August 1986, the master recordings were licensed by Bearsville to Rounder Records. The result of this agreement was the 1987 release of an album of Byrd's music taken from the master recordings. This licensing agreement clearly demonstrated Bearsville's intent to exercise control over the Byrd recordings to the exclusion of SongByrd. See Jaywyn Video Productions, Ltd. v. Servicing All Media, Inc., 179 A.D.2d 397, 577 N.Y.S.2d 847, [illegible] (1st Dep't 1992) (licensing of property rights demonstrates exercise of dominion and control). Any claim for conversion, therefore, accrued no later than August 1986 and was

time-barred at the time this action was filed in 1995.[4] That SongByrd may not have known of the conversion at the time it occurred is of no moment. Two Clinton Square Corp. v. Friedler, 91 A.D.2d 1193, 459 N.Y.S.2d 179 (4th Dep't 1983); Memorial Hosp. v. McGreevy, 152 Misc.2d 127, 574 N.Y.S.2d 923, 925 (1991) (claim accrues at time of conversion "even though the plaintiff may have been unaware of the occurrence.").[5]

Where, as here, "[t]he conduct of the defendant certainly constituted a denial of both the plaintiff's right to the master recording and a total usurping of plaintiff's right to possess the master recording," the claim is properly stated as one for conversion. Sporn, 462 N.Y.S.2d at 416, 448 N.E.2d 1324. That claim is clearly untimely. The time-bar arose in August 1989, three years following the licensing agreement with Rounder Records.[6]

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[4] SongByrd has not argued that any tolling provision applies here.

[5] SongByrd's assertion that the decision from the Fifth Circuit precludes consideration of the licensing agreement's effect on the statute of limitations is misplaced. That decision concerned Louisiana law, not the New York law applicable here.

[6] In the alternative the conversion occurred no later than August 1991 when Bearsville licensed the master recordings to Rhino Records. That agreement resulted in the 1991 Rhino Records release of an album containing seven tracks produced from the master recordings. The exact date of the Rhino Records licensing deal is not clear in the record but necessarily occurred in or before 1991. Thus, with 1991 as the date of conversion, SongByrd's claim was time-barred prior to the commencement of this action in 1995.

Conversion is not a continuing wrong for which every new act that might constitute conversion restarts a new limitations period. Tinker v. Abrams, 640 F. Supp. 229, 232 (S.D.N.Y. 1986) (citing Sporn, 462 N.Y.S.2d at 415-16, 448 N.E.2d 1324). Here, SongByrd simply failed to commence this action within the applicable statute of limitations. Bearsville's motion must, therefore, be granted.

V. Conclusion

WHEREFORE, for the reasons set forth above, it is hereby **ORDERED** that the defendant's motion for summary judgment is **GRANTED**; and

IT IS FURTHER ORDERED that the Clerk of the Court serve a copy of this order, by regular mail, upon all parties to this action.

IT IS SO ORDERED.

Appendix D

United States Court of Appeals
For the Second Circuit.

SONGBYRD, INC., Plaintiff – Appellant,

v.

ESTATE OF ALBERT B. GROSSMAN, dba Bearsville Records, Inc., Defendant – Appellee.

No. 98-9544
Summary Calendar.

Mar. 10, 2000.

Appeal from the U.S. District Court for the Northern District of New York.

Justin Asher Zitler, New Orleans, LA. (Heslin, Rothenberg Law Firm, Albany, N.Y., on the brief), for plaintiff-appellant.

Mario D. Cometti, Ryan & Smallacome, LLP, Albany, N.Y., for defendant-appellee.

JON O. NEWMAN, Circuit Judge.

This appeal concerns a congeries of issues relating to (1) the procedure to be followed in challenging a district court's transfer order, (2) the existence of personal jurisdiction, and (3) the accrual of a cause of action under New York law for wrongful possession of a chattel. The

issues arise on an appeal by SongByrd, Inc., from the October 21, 1998, order of the United States District; Court for the Northern District of New York (David R. Homer, Magistrate Judge) rejecting as time-barred a suit brought against the estate of Albert B. Grossman, doing business as Bearsville Records.[1] SongByrd's suit sought to establish ownership of master recording tapes made by Henry Roeland Byrd, a New Orleans rhythm-and-blues pianist and composer. We conclude that personal jurisdiction was lacking in Louisiana, where the suit was originally brought, that it was properly transferred to the Northern District of New York, and that the suit is time-barred. Accordingly, we affirm.

Background

A. Facts

The complaint and supporting documents alleged the following historical facts, which are undisputed for purposes of the challenged ruling that the suit is time-

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[1] The caption of the case in this Court refers to Grossman's estate doing business as "Bearsville Records, Inc." See SongByrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 774 (5th Cir. 1997). The latter designation appears to be more accurate since Bearsville Records, Inc., has been dissolved. See id. at 775. The transfer order entered by the District Court for the Eastern District of Louisiana also noted that the case caption's reference to the estate as doing business as Bearsville Records, Inc. is incorrect.

barred.[2] The late Henry Roeland Byrd, known professionally as "Professor Longhair," enjoyed some success as a recording artist in New Orleans in the 1940's and 1950's. In 1971 he was discovered working in a New Orleans record store by Arthur "Quint" Davis, who needed performers for the New Orleans Jazz and Heritage Festival, known as "JazzFest," which Davis and others had organized. Byrd became a star attraction of JazzFest until his death in 1980.

Early in the 1970's, Davis and attorney Parker Dinkins arranged for Byrd to make several master tapes in a Baton Rouge studio. After hearing demo tapes produced from these master recordings, Albert Grossman, president of Bearsville Records, Inc., in Woodstock, New York, arranged with Davis and Dinkins for Byrd and another New Orleans musician to travel to Woodstock for a recording session. The results of that session were unsatisfactory, and thereafter Davis sent the master tapes to Grossman. According to an uncontradicted affidavit of Davis, the tapes were delivered "as demonstration tapes only, without any intent for either Albert Grossman or Bearsville Records Inc. to possess these aforementioned tapes as owner."

The tapes remained in Grossman's possession. Dinkins, acting on behalf of Davis and Byrd, wrote two letters to Bearsville Records, Inc. in 1975 requesting return

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[2] A more extensive factual history is set forth in a Fifth Circuit opinion at an earlier stage of this litigation. See SongByrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 774-75 (5th Cir. 1997) ("SongByrd I").

of the master recordings. It is not clear whether the letters were ever received. In any event, Bearsville Records, Inc. made no response, and Dinkins did not pursue the matter.

After Grossman died in 1985, Bearsville Records, Inc., was dissolved, but Grossman's estate ("the Estate") continued doing business as Bearsville Records and continued in possession of the master tapes.[3] The Estate did not produce any records itself, but licensed recordings and made its studio available for rental to musicians. In 1986, as part of its licensing business, the Estate licensed some of the Byrd master recordings to Rounder Records Corporation ("Rounder") of Cambridge, Mass., for an advance against royalties. In 1987, Rounder released an album of Byrd's recordings, which garnered Byrd a posthumous Grammy Award for Best Traditional Blues Album of 1987. The Estate also licensed some of the master recordings to Rhino Records ("Rhino"), which released an album in 1991 with seven tracks from the Byrd master recordings.

In 1993, SongByrd, Inc. was incorporated as a successor-in-interest to the intellectual property rights of Byrd and his deceased widow.

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[3] The plaintiff's complaint recounts the unusual circumstances under which the tapes went from Grossman's possession to that of his estate: "Upon information and belief, tragically dying en route [from a European music conference], Albert Grossman lay in state [sic] at Heathrow Airport in London. Upon claiming the corpse, Sally Grossman, widow of Albert Grossman, discovered the Baton Rouge recording sesion tapes clutched to the deceased body." Complaint, ¶ XVII

B. Proceedings in Louisiana

On August 14, 1995, SongByrd filed a "Petition in Revendication" against the Estate in the Civil District Court for Orleans Parish, Louisiana. The petition sought a declaration that SongByrd owned the master tapes, return of the tapes, $50,000 in damages (the amount of the licensing fees allegedly already paid as an advance on royalties) , substitution of SongByrd in any of the Estate's existing licensing agreements, and interest, fees, and costs.

The Estate removed the case to the United States District Court for the Eastern District of Louisiana (G. Thomas Porteous, Jr. District Judge) on diversity grounds, the jurisdictional amount for which was then $50,000.

In its answer, the Estate asserted two affirmative defenses: (1) lack of personal jurisdiction under the Louisiana long-arm statute, and (2) the action was time-barred. The Estate's Rule 12 motion to dismiss was treated as a motion for summary judgment because the parties submitted numerous affidavits. Explicitly declining to consider the personal jurisdiction issue, the District Court dismissed the suit on the ground that the action was time-barred. On appeal, the Fifth Circuit reversed, ruling that the District Court had erroneously upheld the Estate's time-bar defense on the record then made. See SongByrd I, 104 F.3d at 781. The Fifth Circuit remanded for further consideration of the time-bar

defense,[4] and to permit initial consideration of the personal jurisdiction issue. See id.

On remand, the Louisiana District Court entered a brief order (1) reflecting that the Court had found that it lacked personal jurisdiction over the Estate and (2) sua sponte transferring the action to the District Court for the Northern District of New York.

C. Proceedings in the Northern District of New York

After the transfer, the parties agreed to adjudication by a magistrate judge, see 28 U.S.C. § 636(c) (1994), and the transferred action was assigned to Magistrate Judge Homer. On the Estate's motion for summary judgment, Magistrate Judge Homer ruled that (1) New York law applied because the ground for the transfer was that the Louisiana District Court lacked personal jurisdiction over the Estate, (2) the pertinent limitations period was New York's three-year limitations period for conversion and

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[4] Applying provisions of Louisiana's Civil Code, the Fifth Circuit ruled that SongByrd's suit seeking recognition of ownership of movable property was as "innominate real action" and that the applicable "prescription" (type of limitations) was "aquisitive" and not "liberative." Therefore, only adverse possession without notice and not merely lapse of a specified time interval without a claim could defeat SongByrd's ownership claim. On the then-existing record, the Court ruled that SongByrd's contention that the Estate was only a "precarious possessor" (bailee) of the tapes had not been rebutted. The Court noted that the Estate could still defeat SongByrd's claim by showing "aquisitive prescription'" i.e., actual notice to the public and SongByrd that the Estate intended to possess the tapes as owner. See SongByrd I, 104 F.3d at 777-81.

recovery of chattels, see N.Y. C.P.L.R. 214(3) (McKinney 1990), (3) SongByrd's action accrued no later than August 1986 when Bearsville licensed the master tapes to Rounder, and (4) the suit, filed in 1995, was time-barred. see SongByrd, Inc. v. Estate of Albert B. Grossman, 23 F. Supp. 2d 219, 221-23 (N.D.N.Y. 1998) ("SongByrd II").

Discussion

I. The Transfer Order from the Eastern District of Louisiana

Although SongByrd has not explicitly challenged the transfer order, its challenge to the Louisiana court's ruling that personal jurisdiction over the Estate was lacking implicates the transfer ruling, which was based solely on lack of personal jurisdiction. Moreover, uncertainty in the law of this circuit concerning the proper procedure to be followed in challenging a transfer order makes it appropriate to give the matter some consideration. Four issues arise: (1) Is the transfer order reviewable in the transferor circuit? (2) If not reviewed in the transferor circuit, is it reviewable in the transferee circuit? (3) If review in the transferee circuit is proper, is a retransfer motion in the transferee district court required to preserve the transfer issue for appeal? (4) Where the transfer is ordered for lack of personal jurisdiction, what must the party opposing transfer show in order to have the transferee circuit reach the meritn of the personal jurisdiction ruling?

1. Reviewability

A transfer order is an interlocutory order that is not immediately reviewable by appeal. See D'Ippolito v. American Oil Co., 401 F.2d 764, 764-65 (2d Cir. 1968); 17 Moore's Federal Practice § 111.60 [1] (3d ed. 1999) ("Moore"). Review of transfer orders by writ of mandamus in the transferor circuit might be availale,[5] but

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[5] Our Court has acknowleged the availability of review of a transfer order in the transferor circuit by petition for mandamus, but has also been markedly reluctant to grant the writ. See Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971); Golconda Mining Corp. v. Herlands, 365 F.2d 865 (2d Cir. 1966); A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439 (2d Cir. 1966). Judge Friendly deemed mandamus unavailable to review the district judge's exercise of discretion to order a transfer, believing such review available "only when there is an issue of transferability or a substantial claim that the judge has refused to exercise or usurped judicial power." Id. at 447-48 (Friendly, J., concurring). Arguably, a transfer for lack of personal jurisdiction is more amenable to mandamus review than a typical transfer under 28 U.S.C. § 1404(a) for the convenience of parties and witnesses, although we have at least once issued mandamus in the latter circumstance, see In re Warrick, 70 F.3d 736, 740-41 (2d Cir. 1995). We have acknowleged the availability of review of a transfer order under 28 U.S.C. § 1292(b) when "it is urged that the court considered improper factors in making its decision to transfer." Red Bull Associates v. Best Western International, Inc., 862 F.2d 963, 965 n.4 (2d Cir. 1988); see Farrell v. Wyatt, 408 F. 2d 662, 665 (2d Cir. 1969) ("[W]hen the question is the district court's power [to transfer], a proper- -although not exclusive- - procedural approach is to seek an interlocutory appeal under 28 U.S.C. § 1292(b).").

Where a transfer request has been rejected, our Court has entertained, but denied, a petitiom for mandamus to compel a transfer. See Lykes Bros. Steamship Co. v. Sugarman, 272 F.2d 679, 682 (2d Cir. 1959).

the Fifth Circuit, to which SongByrd might have petitioned, rarely grants such review, see 15 Charles A. Wright et al., Federal Practice and Procedure § 3855, at 488-89 (2d ed. 1986). The failure to seek mandamus review of an interlocutory ruling does not forfeit the opportunity to obtain review on appeal from a final judgment. See 19 Moore § 203.32 [3] [b]; cf. Arthur V. Nyquist, 547 F. 2d 7, 9 (2d Cir. 1976) (interlocutory appeal permissive, not mandatory).

2. Review in the Transferee Circuit

In the transferee circuit, review of a transfer order is available upon appeal from a final judgment. See Magnetic Engineering & Manufacturing Co. v. Dings Manufacturing Co., 178 F.2d 866, 869 (2d Cir. 1950) (L. Hand, C.J.). Judge Frank, who dissented in Magnetic Engineering because he would have reviewed the transfer order by mandamus, understood the majority opinion to recognize the possibility that the transferee court of appeals could issue mandamus to direct a retransfer, See id. at 871 (Frank, J., dissenting in part).

3. Need for a Motion to Retransfer

Most Circuits have held that in order to preserve the opportunity for review of a transfer order in the transferee Circuit, a party must move for retransfer in the transferee district court. See FDIC v. McGlamery, 74 F.3d 218, 221 (10th Cir. 1996); United States v. Copley, 25 F. 3d 660, 662 (8th Cir, 1994); Brock v. Entre Computer Centers, Inc., 933 F. 2d 1253, 1257 (4th Cir. 1991); Moses v. Business Card

Express, Inc., 929 F.2d 1131, 1136 (6th Cir. 1991); National-Standard Co. v. Adamkus, 881 F.2d 352, 356 (7th Cir. 1989); Nascone v. Spudnuts, Inc., 735 F.2d 763, 766 (3d Cir. 1984); Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., 689 F. 2d 982, 989 (11th Cir. 1982); cf. Hill v. Henderson, 195 F.3d 671, 677 & n.2 (D.C. Cir. 1999) ("If the party transferred against its will to a new court failed to move for retransfer, the omission might waive any claim on the subject.") (emphasis added) But see American Fidelity Fire Insurance Co. v. United States District Court, 538 F.2d 1371, 1377 n.4 (9th Cir. 1976) ("On appeal from a final judgment we may exercise our appellate jurisdiction to review a district court's transfer order, even if the transferor court is not wilhin our circuit."). See generally 17 Moore § 111.64 [2] [b]. The rationale for this rule is that a court of appeals normally has no jurisdiction to review the decision of a district court in another circuit, but may review a ruling by the transferee court denying retransfer. See Roofing & Sheet Metal Services, Inc., 689 F.2d at 986 (citing 28 U.S.C. § 1294(l), which provides that, with exceptions not relevant to this case, "appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals... [f]rom a district court... to the court of appeals for the circuit embracing the district") Purex Corp. v. St. Louis National Stockyards Co., 374 F.2d 998, 1000 (7th Cir. 1967) (noting the lack of a motion to retransfer); Preston Corp. v. Rease, 335 F.2d 827, 828 (4th Cir. 1964) (noting the lack of a "motion for remand").

The Second Circuit has not ruled on whether a transfer order may be reviewed on appeal from a final judgment without a request in the transferee district court for retransfer. In D'Ippolito, we noted that a transfer order of a district court in this Circuit would be reviewable in the transferee Circuit on appeal from a final judgment if the transferee district court denied a motion to retransfer. See 401 F.2d at 795. We thus contemplated a retranafer motion, but did not then explicitly require one.[6] With the issue now before us, we think a retransfer motion should be required. Once the case has been transferred, subsequent developments might make retransfer appropriate, and the requirement of a retransfer motion obliges the party opposing che initial transfer to make

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[6] The efficacy of a retransfer motion to preserve the transfer issue for review on appeal from a final judgment was placed in some doubt by dictum in Kotlicky v. United States Fidelity & Guaranty Co., 817 F.2d 6, 7 n.1 (2d Cir. 1987). On appeal from the denial of a Rule 60(b) motion to vacate a final judgment (an appeal that does not bring up for review the rulings that preceeded entry of the judgment, see Branum v. Clark, 927 F.2d 698, 704 (2d Cir. 1991)), we properly declined to review the denial of a retransfer motion (which would have been available for review on appeal from the judgment). However, we said that the review of the retransfer denial was unavailable because such rulings "are interlocutory and not appealable except by certification under 28 U.S.C. § 1292(b), or by petition for mandamus." Id. (citations omitted). That dictum was correct only to the extent of noting the unavailability of interlocutory appeal of transfer orders; it was incorrect in suggesting that review of a retransfer order was unavailable on appeal from a final judgment. The dietum did not reckon with D'Ippolito's contemplation of such review. See D'Ippolito, 401 F.2d at 765. We decline to elevate that dictum to a holding.

clear that its opposition in che transferor court was serious, and affords the transferee court an opportunity to assess the then-current circumstances.[7] However, since we have not imposed such a requirement in the past and since the Estate does not claim that the lack of a retransfer motion forfeits SongByrd's opportunity for review, we will entertain SongByrd's challenge to the transfer ruling.

The Estate challenges the reviewability of the transfer order only on the ground that SongByrd's notice of appeal does not explicitly refer to that order. This ground for challenge lacks merit. The notice of appeal recites that

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[7] A district court considering a retransfer motion might be limited by "law of the case" principles, at least in the absence of changed circumstances. See Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 816 (1988) ("[T]he policies supporting the [law of the case] doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation."). Compare Hill, 195 F.3d at 677 ("[A]t the time of a motion to retransfer the transfer order would be law of the case binding the second district court (in the absence of clear error or manifest injustice..."), Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1518 (10th Cir. 1991), and Nascone, 735 F.2d at 765-66, with Roofing & Sheet Metal Services, Inc., 689 F.2d at 989 ("Although... a district court cannot perform an appellate function by directly reviewing the decisions of another district court, there is nothing to prevent [the transferee district court] from independently considering a motion to retransfer."). On appeal, however, a court of appeals reviewing the denial of a retransfer motion would not be limited by the law of the case, as announced by the transferor district court. See Christianson, 486 U.S. at 816-17; Hill, 195 F.3d at 677; Nascone, 735 F.2d at n.9.

SongByrd is appealing from the Memorandum-Decision and Order, entered 21 October, 1998, granting Defendant's Motion for Summary Judgment," see Fed. R. App. P. 3(c)(1)(B) (notice of appeal must designate the judgment, order, or part thereof being appealed) (emphasis added). Upon entry of this Order, the Clerk's Office inadvertently neglected to prepare and enter a judgment, but the absence of a separate judgment document may be waived, see Bankers Trust Co. v. Mallis, 435 U.S. 381, 387-88 (1978), and a party may (but is not required to) appeal from a dispositive order without awaiting entry of judgment, see United states v. Interlink Systems, Inc., 984 F.2d 79, 82 (2d Cir. 1993). Just as a notice of appeal from a final judgment brings up for review all reviewable rulings "which produced the judgment," 20 Moore § 303.21 [3][c], at 303-47, a dispositive order clearly intended to end a litigation should have a similar effect, see Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 626 (7th Cir. 1993).[8]

4. The Requisite Knowing to Reverse a Transfer Ruling After Final Judgment

Courts discussing review of transfer rulings after entry of a final Judgment have not always distinguished between two closely related concepts: (1) the standard of

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[8] A notice of appeal that explicitly refers to only one ruling antecedent to either a final judgment or a dispositive order might limit reviewability to the referenced ruling, see Shrader v. CSX Transportation, Inc., 70 F.3d 255, 256 (2d Cir. 1995), but this limitation will not always occur, see United States v. Vasquez, 145 F.3d 74, 79 (2d Cir. 1998).

review to be applied to the decision granting or denying transfer (or the decision of a transferee court denying retransfer), and (2) the showing required to reverse a transfer ruling. Although a transfer order for the convenience of parties or witnesses under section 1404 (a) is reviewed for abuse of discretion, see Filmline (Cross-Country) Productions, Inc. v. United Artists Corp., 865 F.2d 513, 520 (2d Cir. 1989); 17 Moore § 111.63, a ruling on personal jurisdiction is accorded plenary review, see. Chaiken v. VV Publishing Corp., 119 F.3d 1018, 1025 2d Cir. 1997); 17 Moore § 111.63, and a transfer order entered because of lack of personal jurisdiction over the defendant should therefore receive plenary review.[9] Cf. Chaiken,

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[9] At one time our Court ruled that a district court lacking personal jurisdiction had no power to transfer, see Goldlawr, Inc. v. Heiman, 288 F.2d 579, 586 (2d Cir. 1961), but the Supreme Court reversed that ruling and made clear that a district court lacking both personal jurisdiction and proper venue could transfer under section 1406(a) to a district where both defects were avoided, see Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962). Thereafter, we ruled that, whether or not venue was proper, lack of personal jurisdiction could be cured by transfer to a district in which personal jurisdiction could exercised, with the transfer authority derived from either section 1406(a) or section 1404(a). See Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978) (adopting Judge Weinfeld's view in Volk Corp. v. Art-Pak Clip Art Service, 432 F. Supp. 1179, 1181 & nn.4-5 (S.D.N.Y. 1977)). See generally 17 Moore § 111.02[1][b].

The Tenth Circuit has ruled that authority to transfer for lack of personal jurisdiction is provided by 28 U.S.C. § 1631 (1994), see Viernow v. Euripides Development Corp., 157 F.3d 785, 793 (10th Cir. 1998), but the legislative history of section 1631 provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction. See S. Rep. No. 97-275, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 11, 40

119 F.3d at 1025, 1030-31 (plenary review accorded personal jurisdiction issue in order to determine whether law of transferor jurisdiction applied). Thus, with respect to the transfer ruling in the pending case, which was entered solely because the Louisiana court ruled that it lacked personal jurisdiction over the Estate, plenary review is warranted.

To obtain reversal of a transfer ruling (whether granting or denying transfer) after entry of a final judgment, the party urging reversal faces a formidable task. In the context of a motion to transfer for the convenience of parties or witnesses, we have indicated that the party complaining of lack of a transfer would have to "show that a different result would have been reached had the suit been transferred," Filmline, 865 F.2d at 520 (internal quotation marks ominted) (quoting Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir. 1950)), and the party opposing a transfer that was ordered would similarly have "to show that it lost the case because of the handicap of the transfer," Magnetic Engineering, 178 F.2d at 869 (discussing burden to be faced in the transferee circuit). With respect to a transfer based on lack of personal jurisdiction, the party opposing the transfer must similarly demonstrate at least a high likelihood that the

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("Section 301 [section 1631] adds a new chapter to title 28 that would authorize the court in which a case is improperly filed to transfer it to a court where subject matter jurisdiction is proper."); Levy v. Pyramid Co. of Ithaca, 687 F. Supp. 48, 51 (N.D.N.Y. 1988) (Section 1631 limited to subject matter jurisdiction transfers), aff'd without considerastion of this point, 871 F.2d Cir. 1989).

outcome of the litigation in the transferor court would have been different from the outcome in the transferee court, different not because of speculative concerns about the likely predisposition of local judges and juries, but because of substantive differences in outcome-determinative law applicable to an issue governed by state law.[10] Such differences in substantive law are relevant because in a transferred action the law of the transferor jurisdiction applies, see Van Dusen v. Barrack, 376 U.S. 612, 639 (1964), only if the transferor court has personal jurisdiction, see Chaiken, 119 F.3d at 1030; Levy v. Pyramid.Co. of Ithaca, 871 F.2d 9, 10 (2d Cir. 1989).[11]

Thus, in the pending cane, if SongByrd's claim would be time-barred under the law of both Louisiana and New York, it would have no complaint that personal jurisdiction was ruled lacking in Louisiana. In that event, we would not need to review Judge Porteous's jurisdiction ruling. On the other hand, if Louisiana law accords SongByrd a more generous limitations period than New

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[10] A defendant disputing personal jurisdiction in the transferor court would presumably not seek a transfer but would seek dismissal, as the Estate did here. Upon dismissal, the plaintiff-appellant would have to show only that personal jurisdiction existed, and no choice of law issue would arise. In the pendeing case, the transfer was ordered sua sponte by Jugde Poreous.

[11] In Chaiken, the tranfer ruling itself was unopposed, see 119 F.3d at 1030, but, on appeal from a final judgment, the appallant claimed that personal jurisdiction over the defendant would have been proper in the trasnsferor district, not to secure a retransfer, but solely to have the benefit of the substative law of the transferor jurisdiction.

York, or at least affords it a significantly greater opportunity to demonstrate that its claim is not time-barred, then we would need no determine whether personal jurisdiction in Louisiana was lacking, because the more favorable substantive state law is applicable only if personal jurisdiction exists in Louisiana.[12]

We could pause at this point and discuss fully whether SongByrd's claim survives in Louisiana but encounters a time-bar in New York, but the opinion will unfold more coherently if we turn to the issue of personal jurisdiction, noting now only that the Fifth Circuit has already given SongByrd substantial reason to believe that its claim is not time-barred in Louisiana, and that our subsequent discussion, see Part III, infra, will rule that the claim is time-barred in New York.

II. Personal Jurisdiction[13]

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[12] If personal jurisdiction existed in Louisiana (as well as in New York), we would then face the issue whether to order a retransfer to Louisiana or to decide the case here under applicable (though unfamiliar) Louisiana law.

[13] SongByrd did not argue before Magistrate Judge Homer that personal jurisdiction was available in Louisiana, but, since we have excused the failure to make a retransfer motion, the personal jurisdiction issue has not been forfeited. In the District Court, the retransfer motion would have turned on whether personal jurisdiction existed in Louisiana. Without the need (in thisacase) for a retransfer motion, SongByrd was entitled to think that it could challenge the Louisiana Court's jurisdiction ruling on appeal from a final judgment without re-presenting the issue to the District Court here.

Whether the Estate is subject to long-arm jurisdiction in Louisiana with respect to SongByrd's cause of action depends on whether Grossman would have been subject to such jurisdiction during his lifetime. That proposition is not self-evident,[14] and was at one time not the law, see McMaster v. Gould, 240 N.Y. 379, 388 (1925); 6A Wright et al., § 1565, at 479, but is true in most jurisdictions today, see id., at least as to causes of action arising out of activity of a decedent within the forum state, provided the forum state extends its long-arm statute to executors for such causes of action. See United States v. Montreal Trust Co., 358 F.2d 239, 241 (2d Cir. 1966); Rosenfeld v. Hotel Corp. of America, 20 N.Y. 2d 25, 281 N.Y.S.2d 308 (1967) (upholding constitutionality of N.Y. C.P.L.R. 302(a) (McKinney 1990)).

Long-arm jurisdiction over an executor with respect to a cause of action against a decedent arising from activity within the state exists in Louisiana. See La. Rev. Stat. Ann. § 13-3201 (West 2000) (extending jurisdiction, where otherwise applicable, to "nonresident"); id. § 3206 (defining "nonresident" to include an "executor, administrator, or other legal representative" of an individual.

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[14] Though an estate is liable for the debts of the decedent, it is arguale that, since it has succeeded to the interests of the decedent by operation of law and the fortuities of life, rather than by choice (such as in a corporate acquisition), it should not be required to defend the decedent's interests in a foreign forum.

The parties agree that Louisiana's personal jurisdiction statute has regularly been interpreted by the Louisiana courts to reach as far as the Due Process Clause permits. See, e.g., Superior Supply Co. v. Associated Pipe and Supply Co., 515 So. 2d 790, 792 (La. 1987). Thus the issue is whether Grossman's contacts with Louisiana sufficed to satisfy due process requirements.[15]

Grossman's contacts with Louisiana, relevant to this lawsuit, are extremely scant. He was never in Louisiana. In New York, he heard demo tapes that had been made in Louisiana, contacted Byrd and Byrd's managers in Louisiana, and invited them to come to New York to make recordings. The recordings were unsatisfactory, and thereafter Byrd's managers sent the master tapes to Grossman in New York. Nothing in the record (apart from an unsupported allegation in the complaint) suggests that the master tapes were sent at Grossman's request. Grossman retained possession of the master tapes, without any contact with Byrd or his managers and without any activity in Louisiana. The invitacion to Louisiana residents to come to New York to make recordings is far too insubstantial a contact to support personal jurisdiction with respect to a cause of action for wrongful possession of master tapes than the residents later sent to Grossman. Although the suit concerns

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[15] SongByrd urges that we certify this question to the Louisiana Supreme Court. See brief for Appellant at 10-14. Since the issue involves application of federal due process requirements, rather than any dispute about the meaning of Louisiana law, certification is not warranted.

ownership of a chattel (the master tapes) made in Louisiana by a Louisiana resident, Grossman did not obtain the capes in Louisiana, or take any action in Louisiana that caused the tapes to be sent to him. Although his invitation to Byrd and his managers to come to New York to make recordings can be viewed as a "but for" cause of the eventual shipment of the demo tapes to New York, there was no necessary or even likely connection between these events, and the connection is too tenuous to satisfy the "specific jurisdiction" component of due process analysis. See Metropolitan Life Insurance Co. v. Robertson-Ceco Corp, 84 F.3d 560, 567-68 (2d Cir. 1996). The "general jurisdiction" component, which requires continuous and systematic general business contacts with the forum, see id. at 568, is not remotely satisfied.

Since personal jurisdiction was lacking in Louisiana, the transfer was properly ordered.

III. Statute of Limitations

With the Northern District of New York properly regarded as the forum state after the valid transfer for lack of personal jurisdiction in Louisiana, there can be no doubt that New York's statute of limitations determines whether SongByrd's suit, alleging a wrongful conversion of a chattel in New York, is time-barred, See Levy, 871 F.2d at 10. The parties do noc claim otherwise. Nor do they dispute that the relevant statute is the three-year limitations period for conversion and recovery of chattels. See N.Y. C.P.L.R. § 214 (3) (McKinney 1990). Their

dispute concerns the time when SongByrd's cause of action accrued. The Estate contends, as the District Court ruled, that under New York law the limitations period for conversion begins to run at the time of the conversion. The District Court found that the conversion occurred when the Estate licensed the master recordings in 1986, well beyond the limitations period.

Three decisions bear on the accrual issue. In Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 462 N.Y.S.2d 413 (1983), the New York Court of Appeals considered whether a cause of action for conversion accrued when the possessor "first began using plaintiff's property as its own," id. at 484, 482 N.Y.S.2d at 414, or whether a new cause of action accrued each time the defendant used the property the plaintiff claimed to own. The property was a master recording. The Court of Appeals ruled that the plaintiff had only a single cause of action (for conversion) and that it accrued when the defendant began "commercially exploring" the property as its own. See id. at 489, 462 N.Y.S.2d at 416.

In Soloman R. Guggenheim Foundation v. Lubell, 77 N. Y. 2d 311, 567 N.Y.S.2d 623 (N.Y. 1991), the Court of Appeals considered a replevin claim by a New York City museum against a good-faith purchaser for return of a painting that had been stolen from the museum. The principally disputed issue was whether the plaintiff's, cause of action did not accrue until the plaintiff made a demand upon the possessor for return of the painting and the demand was refused, or whether the plaintiff's lack of due diligence in locating the painting resulted in the cause

of action accruing at some earlier time. The Court applied New York's rule that "a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refused to return it." Id. at 317-18, 567 N.Y.S. 2d at 626. Lubell rejected a requirement that the claimant to ownership exercise due diligence in locating its chattel, but acknowledged the New York rule that an owner, "having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property." Id. at 319, 567 N.Y.S. 2d at 627 (citations omitted). Lack of diligence in locating the property was to be considered only with respect to a laches defense. See id. at 321, 567 N.Y.S,2d at 628.

In Hoelzer v. City of Stamford, 933 F.2d 1131 (2d Cir. 1991), we considered the City of Stamford's claim to recover W.P.A. murals that had once adorned the walls of the Stamford High School. Claiming ownership, the City brought a replevin action to recover the murals from Hoelzer, to whom the General Services Administration had delivered them in 1971 for storage and restoration. The City of Stamford was initially unaware of Hoelzer's possession of the murals and, even after becoming aware, did not know that he was claiming ownership until 1986, within three years of the lawsuit, at which point the City demanded their return. This Court applied Lubell and ruled that under New York's demand-and-refusal rule, the City's claim was timely. See id, at 1137. Although Lubell had involved a stolen chattel in possession of a

good-faith purchaser, Hoelzer applied the Lubell demand-and-refusal rule to artwork that was not stolen and chat was in possession of a custodian. Since New York used the demand-and refusal rule to delay the accrual of the claim of the true owner even against a good-taith purchaser, Hoelzer understandably applied the rule to protect the true owner against a mere bailee who had not, prior to demand and refusal, acted to assert ownership.

Sporn bars SongByrd's claim. Like the possessor in that case, the Estate began using the master tapes as its own when it licensed portions of them to Rounder in 1986:,. See Jaywyn Video Productions, Ltd. v. Servicing All Media, Inc., 179 A.D.2d 397, 577 N.Y.S. 2d 847 (1st Dep't 1992) (licensing of films by library holding them constituted conversion). The conversion alleged by SongByrd occurred no later than that date.[16] The demand-and-refusal rule, which functioned to delay accrual of the claim in Lubell and Hoelzer for the benefit of the true owner, normally provides some benefit to the good-faith possessor by precipitating its awareness that continued possession will be regarded as wrongful by the true owner. See Ashton Hawkins et al., A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art, 64 Ford. L. Rev. 49, 69-70 (1995). New York has not required a demand and refusal for the accrual of a conversion claim against a possessor who openly deals with the property as its own.

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[16] Other portions of the master tapes were licensed to Rhino in 1991.

Even if a demand were required for accrual of SongByrd's claim, Lubell instructs that a plaintiff may not unreasonably delay in making a demand for property whose location is known. Byrd, either independently or through his agents, had knowr since the 1970's that the master tapes were in Grossman's possession, and the unanswered letters to Grossman in 1975 for return of the master tapes probably sufficed to alert him to Grossman's disregard of his ownership claim, thereby rendering any demand thereafter unreasonably delayed. In any event, his successors' delay in not making a demand in 1987, when of the master tapes became well known in the Bearsville's licensing music world as a result of the Grammy Award for Byrd's recordings, was clearly unreasonable.

Where required, the demand-and-refusal rule "change[s] the character" of a good-faith possession before an action for conversion or recovery of a chattel can be maintained.[17] See Goodwin v. Wertheimer, 99 N.Y. 149, 152 (1885) (cited with approval in Lubell, 77 N.Y. 2d at 318, 567 N.Y.S. 2d at 626). As in Sporn, however, no demand-and-refusal was needed here since the "character" of Bearsville's possession had changed by its actions in treating the master tapes as its own.

---

[17] SongByrd insists that it is not alleging "conversion," only a bailment of indefinate duration," Brief for Appellant at 25-26, which must now be ended. But whether or not it uses the label "conversion," its complaint alleges facts that demonstrate that Bearsville used the tapes as its own, therey converting them (even on the assumption that SongByrd's ownership interest continued up to the point of the conversion).

Conclusion

Because the Appellant's claim is time-barred, the order ot the District Court is affirmed.

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SONGBYRD, INC.	CIVIL ACTION
VERSUS	NO. 95-3706
BEARSVILLE RECORDS, INC	SECTION T

Judge G. Thomas Porteous Presiding

Courtroom Deputy: Richard Windhorst

Court Reporter: Vic Digiorgio

April 30, 1997 10:00

Appearances: Justin Zitler
For Plaintiff

Christina Belew
For Albert Grossman

ORDERED: REMANDED TO NEW YORK

S/ Judge G. Thomas Porteous

Date of Entry May 09 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SONGBYRD, INC.	CIVIL ACTION
VERSUS	NO. 95-3706
BEARSVILLE RECORDS, INC	SECTION T MAG. 1

ORDER

The Court, having found that it lacks personal jurisdiction over defendant, The Estate of Albert Grossman d/b/a Bearsville Records (incorrectly referred to in the petition as Bearsville Records, Inc.);

IT IS ORDERED, ADJUDGED AND DECREED that the captioned matter be transferred from the United States District Court for the Eastern District of Louisiana to the United States District Court for the Northern District of New York.

New Orleans, Louisiana, this 8th day of May 1997.

S/ G. Thomas Porteous, Jr.
G. THOMAS PORTEOUS JR.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY MAY 09 1997

Appendix F

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 95-1205 **DIVISION D**

SONGBYRD, INC.

VERSUS

BEARSVILLE RECORDS, INC.

PETITION IN REVINDICATION TO RECOGNIZE RIGHT OF OWNERSHIP OF MASTER RECORDINGS, FOR RETURN THEREOF, AND DAMAGES

NOW INTO COURT, through undersigned counsel, comes SongByrd, Inc. a corporation licensed to do and doing business in the State of Louisiana, organized under the laws of the State of Louisiana, herein represented by its duly authorized President, Reverend Alexander Byrd, who respectfully avers as follows:

I.

Plaintiff family corporation SongByrd, Inc. is the successor in-interest to all rights and causes of action of Henry Roeland Byrd, p/k/a Professor Longhair, and his deceased widow, Alice Leona Walton Byrd, both of whom were domiciliaries of Orleans Parish at the time of their demise.

II.

Made defendant herein is Bearsville Records, Inc. (hereinafter "Bearsville") a New York corporation doing, and having done business, including business with Professor Longhair, in the State of Louisiana.

III.

Defendants Bearsville Records, Inc. has detained certain master recordings of musical performances by the late Henry Roeland Byrd, p/k/a Professor Longhair, in a clandestine and equivocal manner, and consequently is merely a precarious possessor of said master recordings.

IV.

The master recordings referred to in paragraph III were produced by the personal managers of Professor Longhair, Quint Davis and parker Dinkins, at Deep South Recording Studios in Baton Rouge, Louisiana, in the year 1971.

V.

The master tapes referred to in paragraph III were produced by Quint Davis and Parker Dinkins, while acting within the course and scope of their management of Professor Longhair, or alternatively, as co-venturers with Professor Longhair.

VI.

In 1972, Quint Davis and Parker Dinkins entered into an agreement with Albert Grossman, then President and founder of defendant Bearsville Records, Inc. to record Professor Longhair in the Bearsville recording studio in Woodstock, New York.

VII.

Shortly thereafter, Bearsville brought Professor Longhair and guitarist "Snooks" Eaglin to Woodstock, New York for a recording session pursuant to the agreement with Quint Davis and Parker Dinkins.

VIII.

Bearsville breached the agreement by failing to provide additional musicians in an adequate, good and workmanlike manner. Instead of producing a rhythm section capable of handling the rhythms of the New Orleans sound, Bearsville simply provided a bass guitarist and drummer unsuitable to lay down the bottom for Professor Longhair and Snooks Eaglin.

IX.

As a consequence of the inappropriate sidemen brought to the Bearsville recording session in 1972 by Bearsville, the tapes produced at the Bearsville recording session were not of sufficient quality for release.

X.

Two other recording sessions subsequent to the Bearsville session were paid for by Bearsville, one in New York and one in Memphis, Tennessee, neither of which is at issue here.

XI.

After the failed Bearsville recording session, Albert Grossman to hear other master recordings of Professor Longhair if such were available.

XII.

Pursuant to Grossman's request to hear other Professor Longhair recordings, Quint Davis and Parker Dinkins caused the master recordings complained of herein, to be hand delivered to Bearsville, in 1972.

XIII.

Despite repeated requests over the ensuing 15 years for the return of the said demonstration tapes, Bearsville failed to return the demo tapes.

XV.

The master recordings at issue here contain, but are not limited to the following compositions:

"Title"	"Release"
No Buts and No Maybes *Gone So Long* *She Walk Right In* *Thank you Pretty Baby* *501 Boogie* *Gonna Leave this Town* *Cabbagehead* *Hey Little Girl* *Big Chief* *Everyday I have the Blues* *"G" Jam*	Rounder Records #2057, Copyright 1987 "House Party New Orleans Style" The Lost Sessions 1971-1972
Mardi Gras in New Orleans *Jambalaya (On the Bayou)* *Tipitina* *Fats Domino Medley...* *Whole Lot of Loving* *Gone So Long*	Rhino/Bearsville n#r2 70736 Copyright 1991 "Mardi Gras in Baton Rouge"

How Long Has That Train Been Gone

XVI.

Bearsville then breached its duty to act as fiduciary and/or negotiorum gestor in regard to those tapes by carrying them to the International Music Conference, MIDEM, in Cannes, France, in the year 1985, presumably for licensing purposes.

XVII.

Upon information and belief, tragically dying en route, Albert Grossman lay in state at Heathrow in London. Upon claiming the corpse, Sally Grossman, discovered the Baton Rouge recording session tapes clutched to the deceased body.

XVIII.

A year later, in 1986, Rounder Records of Cambridge, Massachusetts, obtained a quitclaim license for use of these tapes from Bearsville Records, and released eleven of the master recordings (together with certain other Professor Longhair material not at issue here) on the Grammy Award-Winning Album, "House Party New Orleans Style" "The Lost Sessions 1971-72" (Copyright 1987 Rounder). Rounder paid Bearsville the sum of $25,000.00 in consideration for the license.

XIX.

Bearsville then licensed the same master recordings to Rhino Records, which company released 7 other compositions on 1991 release # R2 70736 "Mardi Gras in

Baton Rouge" (Copyright 1991 Bearsville Records, Inc.). Upon information and belief, Rhino also paid Bearsville $25,000.00.

XX.

At no time has Bearsville made any overt or unambiguous act sufficient to put plaintiff on notice of its intent to possess the recordings at issue with anything other that the permission of or on behalf of the plaintiff.

XXI.

At no time did Bearsville have semblance of title to the master recordings at issue here.

XXII.

SongByrd, Inc., as the successor-in-interest to professor Longhair, has made amicable demand for return of the master recordings, or in the alternative, right to ownership thereof, to no avail.

WHEREFORE plaintiff SongByrd, Inc. prays that service and citation issue upon defendant and that after all legal proceedings be had there be judgment in its favor and against Bearsville Records Inc. awarding SongByrd, Inc.:

1) Fifty Thousand Dollars ($50,000.00) in damages;

2) Declaring SongByrd, Inc. owner of the master recordings from the Deep South recording Studios in 1971 including but not limited to the following compositions:

"Title"	"Release"
No Buts and No Maybes *Gone So Long* *She Walk Right In* *Thank you Pretty Baby* *501 Boogie* *Gonna Leave this Town* *Cabbagehead* *Hey Little Girl* *Big Chief* *Everyday I have the Blues* *"G" Jam*	Rounder Records #2057, Copyright 1987 "House Party New Orleans Style" The Lost Sessions 1971-1972
Mardi Gras in New Orleans *Jambalaya (On the Bayou)* *Tipitina* *Fats Domino Medley...* *Whole Lot of Loving* *Gone So Long* *How Long Has That Train Been Gone*	Rhino/Bearsville n#r2 70736 Copyright 1991 "Mardi Gras in Baton Rouge"

3) Substituting SongByrd, Inc., in the place and stead of Bearsville Records, Inc. in any existing contracts, licenses, or agreements regarding the above named compositions;

4) Return of the master recordings embodying the above named compositions;

5) Judicial interest, reasonable attorney's fees, costs of all court and all other equitable relief in the premises.

Respectfully submitted,
S/ Justin Asher Zitler

JUSTIN ASHER ZITLER
Attorney for SongByrd, Inc.
2833 Napoleon Avenue
New Orleans, LA 70115
Bar No. 18517

PLEASE SERVE:

Bearsville Records, Inc. (long-arm statute)
through their agent for service
of process
Corporation Trust Company
227 Park Avenue
New York, NY 10017

Appendix G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SONGBYRD, INC.	Plaintiff	: VERIFIED
- against -		: ANSWER
ALBERT B. GROSSMAN,		:
Estate of d/b/a		: Index No.:
BEARSVILLE RECORDS,	Defendant	: 97-CV-698

---FILED:
Sept. 26, 1997

The defendant, Albert B. Grossman, Estate of d/b/a Bearsville Records, by his attorneys, Ryan, Orlando & Smallacombe, LLP, as and for a verified answer to the complaint herein, alleges as follows:

1. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations and/or statements contained in paragraphs numbered "1", "4", "5", "6", "7", "11", "12", "15", "17", "18", "19" and "22", of the complaint, and refers all questions of law to the Court.

2. Denies each and every allegation and/or statement contained in paragraphs numbered "2", "3", "8", "9", "16", "20" and "21" of the complaint, and refers all questions of law to the Court.

3. Admits so much of the allegations contained in paragraph numbered "10" of the complaint as alleges that there were recording sessions in Bearsville, paid for by Bearsville Records, Inc., both in New York and Tennessee, the number of which defendant lacks knowledge of, and further alleges that defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "10" of the complaint.

4. Admits so much of the allegations contained in paragraph numbered "13" of the complaint as alleges that Bearsville Records, Inc. failed to return the demo tapes/master recordings, denies that defendant ever had a duty or intention to return those tapes, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "13" of the complaint.

5. Notes, for the record, that there is no allegation numbered "14" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

6. The complaint fails to state a cause of action for which relief can be granted

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

7. The Court lacks personal jurisdiction of this answering defendant.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

8. The Court does not have jurisdiction over the subject matter of the plaintiff's cause of action.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

9. That some or all of the plaintiff's claims or causes of action are barred by the applicable Statute of Limitations.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

10. That the plaintiff has a full and adequate remedy at law thereby barring the equitable relief sought.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

11. The defendant has, at all times, held itself out to the public and the plaintiffs, to be the owner of the subject recordings.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B.

GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

12. The plaintiffs are not the real parties in interest and have no cognizable claim for the relief sought in this complaint.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

13. The plaintiff has no standing to bring the equitable claim made in the subject complaint.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

14. Assuming, *arguendo,* that defendant is not the rightful owner of the subject recordings, than those recordings were converted by defendants more than fifteen years ago and any action to recover same is barred by the applicable statute of limitations.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

15. This proceeding is governed by the law of the State of New York and, upon information and belief, does not recognize the cause of action alleged in the complaint as a valid basis for recovery of the relief sought in this complaint.

AS AND FOR A ELEVENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

16. Assuming, *arguendo*, that defendant was not, upon initial receipt of the subject recordings, the rightful owner of them, than defendant now has title and ownership to those recordings by virtue of adverse possession.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

17. Plaintiff comes into court seeking equitable relief with "unclean hands" and therefore is not entitled to the relief sought in the complaint.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

18. Plaintiff does not have standing to bring the claim for money damages alleged in the complaint.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

19. Full payment was made by defendant for the subject recordings before, or at the time of their initial transfer into the possession of defendant more than 25 years ago.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

20. Defendant, from the moment the subject recordings were transferred to its possession, overtly and unambiguously exercised dominion and control of the subject recordings, which remained unchallenged by legal application until some twenty-five years later. As such, any claim by plaintiff to ownership of the recordings and/or entitlement to the proceeds of the licensing of those recordings, is barred by the applicable statute of limitations.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

21. Defendant, was, initially, a co-owner of the subject recordings when possession was first transferred to him but later, with the passage of time and defendant's continuing refusal to return the subject recordings, acquired sole rights to the recordings due to any party in interest's failure to pursue any claimed right or entitlement to same.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

22. Defendant owns the subject recordings by virtue of acquisitive prescription.

AS AND FOR A EIGHTEENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

23. At no time did plaintiff or the real party in interest ever represent to defendant that it agreed to "lend" the tapes to defendant from their initial transfer to defendant's or, assuming *arguendo*, that initially the recordings were received by defendant on "loan", then from at least the first time that the return of the tapes was requested by plaintiff and defendant refused and failed to do so, plaintiff was on notice of defendant's intention to own and possess the subject recordings. As such, the claims made in the complaint are barred by the Statute of Limitations.

AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

24. Defendant was entitled to ownership of the subject recordings as compensation for his "advances" to plaintiff's decedent on or before the transfer of those recordings to defendant's possession.

AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

25. Defendant was entitled to ownership of the subject recordings as compensation for his "advance compensation" made to plaintiff's decedent and/or in

compensation for the moneys expended on behalf of the plaintiff's decedent in and around the year 1972.

AS AND FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE, DEFENDANT, ALBERT B. GROSSMAN, ESTATE OF D/B/A/ BEARSVILLE RECORDS, ALLEGES AS FOLLOWS:

26. The real party in interests transferred ownership of the subject recordings to defendant as and for good and valuable consideration.

WHEREFORE, defendant, demands:

1.) Judgment dismissing the complaint; and/or

2.) the costs and disbursements of this action.

DATED: September 23, 1997

RYAN, ORLANDO & SMALLACOMBE, LLP
Attorneys for Defendant, Albert B. Grossman,
Estate of d/b/a Bearsville Records

s/ Melissa J. Smallacombe, Esq.
MELISSA J. SMALLACOMBE, ESQ.
Federal Bar Roll Number: 102623
Albany, New York

Appendix H

THE LOUISIANA CIVIL CODE

Book II- Things and the Different Modifications of Ownership, Title II- Ownership, Chapter 3, Section 4: Protection Of Ownership

Article 526.
Recognition of ownership; recovery of the thing

The owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him.

Article 526.
Revision Comment (b)

In all civil law systems, the owner of a thing may bring a revendicatory action (*action en revendication*) for the recognition of his ownership and for the recovery of the thing from anyone who possess or detains it without right. 1 Planiol, Civil Law Treatise, Part 2, Sec. 2445 et seq.; Yiannopoulos, Civil Law Property Secs. 124, 125 and 126 (1968); See specifically, Greek Civil Code Arts. 1094, 1095 and BGB Secs. 985 and 986.

In Louisiana, the revendicatory action for the recovery of immovable property is more specifically designated as a *petitory action* and is governed by articles 3651-3654 of the Louisiana Code of Civil Procedure. In addition, the owner of an immovable or of a movable may bring an action for declaratory judgment for the

recognition of his ownership. See Code of Civil Procedure Articles 1871-1883. In Louisiana, the revendicatory action for the recovery of movables in an innominate real action. For Louisiana jurisprudence and doctrine see Yiannopoulos, Civil Law Property Secs. 135 and 145 (1968); Bouchard v. Parker, 32 La.Ann. 535 (1880). The expressions *revendication* and *action en revendication* have been used in the French text of the Code of Practice of 1825. these expressions have been translated in the English texts of the two codes as "reclamation" and "action for the ownership" (or claim for restitution). See Civil Code Arts. 3453 and 3456 (1870). *Cf.* Code of Practice Art. 4 (1870).

Book III- Of the Different Modes of Acquiring the Ownership of Things, Title XXIII- Occupancy and Possession Chapter 1, Section 4:

Article 3437.

Precarious possession

The exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession.

Book III- Of the Different Modes of Acquiring the Ownership of Things, Title XXIV- Prescription Chapter 3, Section 1:

Article 3477.

Precarious possession; inability to prescribe

Acquisitive prescription does not run in favor of a precarious possessor or his universal possessor.

Article 3478.

Termination of Precarious possession; commencement of prescription

Reads in pertinent part:

...Any other precarious possessor, or his universal successor, may commence to prescribe when he gives actual notice to the person on whose behalf he is possessing that he intends to possess for himself.

STATE STATUES: THE LOUISIANA LONG-ARM STATUTE

Louisiana Revised Statutes 13: 3201

A.) A court may exercise persona jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

1.) Transacting any business in this state

2.) Contracting to supply services or things in this state

3.) Causing injury or damage by an offense or quasi offense committed through an act or omission in this state

4.) Causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in

any other persistent course of conduct, or derives revenue from goods used or consumed or services rendered in this state

5.) Having an interest in, using or possessing a real right on immovable property in this state

6.) Non-support of a child, parent, or spouse or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state.

7.) Parentage and support of a child who was conceived by the nonresident while he resided in or was in this state.

8.) Manufacturing of a product or component thereof which caused damage or injury in this state, if at the time of placing the product in to the stream of commerce, the manufacturer could have foreseen, realized, expected or anticipated that the product may eventually be found in this state by reason of its nature and the manufacturer's marketing practices.

B.) In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the constitution of the United States.

PROVISIONS OF THE UNITED STATES CONSTITUTION

U.S. Const. Art. III, § 2, cl. 1
Reads in pertinent part:

The judicial Power shall extend to all Cases in Law and Equity, -- between Citizens of different States.

U.S. Const. Amend. V

Reads in pertinent part:

[No person shall] ...be deprived of life, liberty or property, without due process of law. . .

U.S. Const. Amend. XIV, § 1

Reads in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

FEDERAL STATUTES

28 U.S.C. §1254

Reads in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1292(b)

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in

such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. §1332(a)(1)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, ($50,000 at time of case), exclusive of interest and costs and is between – (1) citizens of different states.

28 U.S.C. §132(c)

For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the state where it has its principal place of business: *provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as the party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any state by which the insured is a citizen as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

28 U.S.C. §1391(a)

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

28 U.S.C. §1404(a)

For the convenience of parties or witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. §1406(a)

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. §1441(a)

Except as otherwise expressly provided by Act of Congress, any civilian action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.